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A

TREATISE

ON

CONVEYANCING;

WITH A VIEW TO ITS

Application to Practice:

BEING A SERIES OF

PRACTICAL OBSERVATIONS,

WRITTEN IN

A PLAIN FAMILIAR STYLE,

WHICH HAVE FOR THEIR OBJECT

TO ASSIST IN PREPARING DRAUGHTS, AND IN JUDGING OF THE OPERATION OF DEEDS, BY DISTINGUISHING BETWEEN THE FORMAL AND ESSENTIAL PARTS OF THOSE DEEDS, &c. IN GENERAL USE:

BEING

A COURSE OF LECTURES.

WITH

AN APPENDIX OF SELECT AND APPROPRIATE PRECEDENTS.

THIRD EDITION, CORRECTED,

WITH ADDITIONS.

VOL. I.

BY RICHARD PRESTON,

OF THE INNER TEMPLE, ESQ.

LONDON:

PRINTED FOR W. CLARKE AND SONS, LAW BOOKSELLERS,
PORTUGAL-STREET, LINCOLN'S-INN.

1819.

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W. Flint, St. Sepulchre's, London.

TO CHARLES BUTLER, ESQ.

LINCOLN'S INN.

MY DEAR SIR,

ALLOW me to place under your patronage the volume now offered to the profession. That it should be received favorably by a gentleman of your experience and extensive research in the study and practice of the Laws of Property ; by the Editor of those *Annotations on Coke on Littleton* which have been so deservedly admired by the profession, and cited with approbation even by the judges ; will not fail to ensure it a favorable reception with those for whose use it is intended.

That you approved of the work when in manuscript, and in an imperfect state, was one of the principal inducements to its publication. At the same time I am fully aware that I am more indebted to your friendship, and kind partiality, than to the merit of the work, for those very favorable terms in

which you have been pleased to express yourself of the performance.

To have merited your friendship is one of those sources of satisfaction, which have supported me, when others have failed ; and posterity will no doubt do ample justice to the liberality, with which you have countenanced those whom you thought likely to become useful members of the profession.

I consider myself only one of many who have been raised into notice under the protection of your patronage and good opinion; and I shall ever retain a grateful sense of the obligations I owe you.

I am, my dear Sir,

Your very faithful,

And obliged Servant,

RICH. PRESTON.

ADVERTISEMENT

TO THE

SECOND EDITION.

IN offering to the public a second edition of this volume, the author cannot refrain from acknowledging, with satisfaction, the very favorable reception which it experienced on its first publication.

The work has been carefully revised; all the authorities have been studiously consulted; and many additional observations have been introduced. A Table of the Terms, from as early a period as the ordinary occurrences of professional practice require, (a Table of great utility in investigating titles under recovery-deeds,) is now prefixed. For this Table the author is indebted to the kindness and liberality of a professional friend. For the revision of the work, and a laborious examination of the authorities, and a critical comparison of the propositions of the work itself with the autho-

rities, he is indebted to the industry and the talents of *Mr. George Cox,* one of his pupils. And it is a gratification to him, to add that he is greatly mistaken, or this gentleman will, at no distant period, be found a zealous and worthy competitor for the meed of professional fame, and for success in the conveyancing department of the profession.

The author hopes that his endeavours will continue to merit that estimation, with which they have been hitherto honored, and which is so grateful to his feelings.

Lincoln's Inn,
July 1st, 1813.

PREFACE

TO THE

FIRST EDITION.

THE greater part of the subject of the following sheets was originally dictated by the author to his pupils in a series of lectures, delivered by him, and committed to writing by them. The avowed object was to assist their studies; to direct their attention to points merely practical; and render their exertions beneficial to them, as well as useful to himself, while they remained in his chambers. The result more than fulfilled his expectations. Encouraged by the observation of the utility of this course of study, he shewed the MS. while in its original state to several of his professional friends; to some who had greater, and to others who had less experience. Had the reception they gave the work been less favorable than it was, he would have felt no hesitation in offering it to the public. He is truly sensible of the friendship of those gentlemen, and of the honor they confer on him by their good opinion. Many, however, of their kind

expressions he ascribes to the partiality of friendship, rather than the merit of his performance.

Such as the work is, it is offered to the profession. In publishing it the author has no other motive than to do good ; to afford to others that assistance for which, at one period, he would have been extremely grateful.

The peculiar advantage of this work, if it has any, is, that it is the fruit of much reflection and extensive experience. It may be considered as the sentiments of a practical man, on a practical subject. As far as the theory is given, the attention is kept closely to those points which are of ordinary occurrence, and comprise the more useful parts of a lawyer's knowledge. Recondite points are highly valuable to form the profound, and well-read lawyer ; but to the student, and mere practical conveyancer, that knowledge is most useful, which is most necessary to be gained for the purposes of general business. When the practice, and the rules by which it is governed, are understood, the study of more abstruse points will be rendered easy. In teaching the law, as well as any other science, it should be a rule to proceed by insensible steps ; to begin with that part which is easy and introductory, and proceed to those parts of the science which are more difficult.

The misfortune of a person, who, either as a clerk to a solicitor, or as a student in a conveyancer's chambers, begins to study the practice of conveyancing, is, that he is taught by form, or precedent, rather than by principle. He is made to copy precedents, without knowing either their application, or those rules on which they are grounded. When he begins to prepare drafts, he is led to expect all his information from these forms; and his knowledge is, in the end, as limited as the means by which he has been instructed.

One of the principal difficulties to be surmounted, by a person so educated, is to gain sufficient strength of mind, and resolution, to free himself from the shackles of precedent. The apprehension of erring makes him fear to try his own resources. This fear proceeds from a want of sufficient knowledge to discriminate between form and substance; in other words, between the formal and the essential parts of a deed, &c. The next difficulty proceeds from the want of ideas; in short, of useful knowledge. Without understanding, from principle, the object to be attained, how is he to accomplish that object? The very foundation is wanting. There are no ideas formed; and, for that reason, none can be brought into action. To acquire these

ideas, extensive reading, and, to a certain extent, the practical knowledge of business, in other words, an intimate acquaintance with the provisions, which are absolutely *necessary*, and also of those which are usual, in transactions of this sort, are to be acquired: and a collection of good precedents is one of the sources from which knowledge of the usual provisions may be attained. When the object to be attained is fully comprehended, the next consideration is the means by which it is to be accomplished. This leads to the form of the assurance.

Two conclusions may be justly formed.—1st. No one will ever become a good conveyancer, unless he understands so much of the law as will make him acquainted with the rules by which property, and the mode of conveying it, are governed. 2dly. Unless he makes himself so far acquainted with practice, so far as to understand those forms which are in use by practical men, he can never attain any eminence. Few who can form correct ideas, feel any difficulty in giving them expression by language; but this will be done, with more or less precision, and more or less succinctly, according to the peculiar habits and talents of the party. In the practice of the conveyancer there is a species of language, found-

ed on decided cases, or sanctioned by experience, which is perfectly understood by all professional men of information: By them it is read with ease, and comprehended without a second thought; because the words have a technical and appropriate sense, on which good lawyers are, by the rules of law, bound to agree. This is the advantage of a close adherence to this species of language. A polite scholar would, perhaps, be disgusted with the phraseology, and with the tameness of the periods. He would be led to make an effort to give the like ideas, in all the elegance of polite diction, and finished sentences. But would any lawyer be able to advise, with certainty, on the construction to which this language would receive? A departure from technical language would, sometimes, allow of a twofold construction; in short, raise a doubt whether the words were to be read in one sense, or in another sense. Something of this is to be discovered in the wills, or the contracts, of some of the best scholars, and even of men who, as merchants, are in the habits of business; and in acts of parliament, when altered by any other than professional men. It is also to be found in the wills of eminent lawyers, who, from their peculiar habits of business, have never turned their attention to express legal forms in techni-

cal language. The great art with the conveyancer, is to use no other language, in the operative part of deeds, than such as has a fixed and definite meaning. For the sake of his reputation, and from a sense of duty, it should be his first care, to use such phrases only as he is satisfied will receive the meaning he ascribes to them, and attain the very precise object at which he aims. If the words he uses, can be read with two different applications, he has injured, instead of serving his client: he has involved him in the chance, at least, of a suit at law, or in equity, instead of placing him in a state of repose and security; and perhaps has injured, nay, even ruined, a man whom it was his intention to have served and protected.

These observations are introduced, for the purpose of shewing the importance of an adherence to language sanctioned by the experience of professional men of eminence. Nor does this language exclude simplicity or neatness. A well-prepared instrument may be read, and admired, by a man of sense. At least, the better it is understood, the more it will please; and an excellent scholar would in the end, be convinced that he could never act more wisely for his ease and comfort, or for the security of his employer, than condescend to become a careful observer

of the language of these forms. His study should be to simplify the terms, as much as circumstances, and the intention will admit. This will be most effectually accomplished, by rejecting tautologous and synonymous expressions, and confining himself to that part of technical language, which is essential to express, or give legal effect to the intention of the parties. The student should also prescribe it to himself as a rule, to adhere to general forms, and to the same language as much as the intention will admit, and to vary the essential parts as often as circumstances require it ; and to be careful to express the essential parts of the deed in language the most precise and definite he can find, or experience, precedent, or his own improved judgment shall dictate. As often as he varies from form, or from the experience of others, he should be well assured, that he is sanctioned by superior authority ; and that the variation will have exactly the effect he wishes to be ascribed to h is language.

These observations are not meant to confine the student to be a mere copyist ; to deny him the best privilege of a liberal mind,—to think and act for himself. They are intended only as cautions to youth, and as a guard against too great anxiety to give proofs of aspiring genius, by a total neglect

of form, or by disregarding the practice of experienced men. The further he advances, the more he will be satisfied of the value of the experience derived from others ; and, as far as the author's observations have enabled him to judge, those gentlemen alone have succeeded who have pursued this course of study, now recommended.

To distinguish between the formal and essential parts of deeds, is one of the great objects of the work now submitted to the profession. To guard the student against error, and to form his mind, as they are objects of the first importance, so they are always kept in view throughout this work.

That this object might be continually enforced, the author has frequently sacrificed himself to his reader. He has rather subjected himself to the imputation of repetition of the same thoughts, in different parts of the work, than neglect those cautions, or that chain of thought, or line of arrangement which the immediate context seemed to require. This will be found in a more than ordinary degree in the chapters on Recoveries and Fines : and it is in those chapters to be accounted for, from the circumstances that the part in recoveries which relates to recovery-deeds ; and the part in fines, which relates to the form, &c. of fines, and the deed to lead or declare

the uses, are additions to the original manuscript.

Each chapter contains a succinct essay on the particular assurance of which it treats. In reference to that assurance there is a part which is *theoretical,* and a part which is *practical.*

The theoretical part is intended to inculcate first principles ; to teach the student *elementary* rules ; the nature, the object, and the use of the particular assurance ; the purposes to which it may be applied, and the circumstances under which it may be used, and the cautions to be observed. The practical observations detail the parts of the deeds, &c. with comments on the form of the assurance. They also distinguish such parts as are formal, from those which are essential. And in the *Appendix* forms are added, in illustration of the practical observations.

This arrangement of the subject accounts in some degree for the arrangement of the book.

Some may express their surprise that the work commences with *Common Recoveries.* This happened by accident ; but this very accident, has perhaps been productive of advantage, as it determined the form of the different chapters.

Sheppard, in his Touchstone, commenced

with fines and common recoveries. This circumstance, however, had no influence in the author's arrangement. For Its origin is wholly attributable to the circumstances under which the observations were dictated.

The original design was to write on detached clauses of deeds, as collected for the use of pupils, in several volumes, denominated *Common Forms.* The clause of agreement for suffering a common recovery, and the declaration of the uses, is the first form, in the first of these volumes; and this single circumstance was the origin of the arrangement of the work.

After some progress had been made with the observations, the author felt, that if he had sat down to write a systematical treatise on conveyancing, he ought to have given a different form to the work, and treated of it, in a more scientific manner, and by way of elementary deduction. Reflection reconciled him to the course he had adopted. Each chapter, as it stands, is a commentary on the particular assurance of which it treats; and the author considers that it may be used by others, as he intended it should be used by his own pupils. The moment it is determined to adopt a particular assurance, for example, a lease and release, the chapter which treats of that assurance may be read by the student, with

a view to understand the general rules respecting these deeds, and the parts of which they consist. When he is preparing his draft, he may consult each division of that part of this chapter, which treats of the form of this assurance; and thus, at once, with the assistance of his precedent, and with no great exertion of mind, combine the theory and the practice, by which his attention is to be governed. By pursuing the same course, as often as he shall find it necessary, he will ultimately, and at no distant period, render any further recourse to this chapter unnecessary.

Beyond the form of a deed, is its final object; for instance, the lease and release may be parts of an assurance for suffering a common recovery; for completing a purchase; for effecting a settlement, &c. The particular learning most interesting, as to common recoveries, will be found under that chapter; and may be consulted as the occasion shall require. And should the author be blessed with life and health, and his labours be favourably received by the profession, he will add chapters which shall contain the appropriate observations on purchases, settlements, &c. Considerable preparation is made towards the accomplishment of this object.

Another reason, too, which determined the author not to begin from the more elementary parts of conveyancing, was that he found this part of the subject, performed in a very valuable little manual, under the title of *Sheppard's President of Presidents*. This work is now out of print. By way of lecture, the writer of these observations, some time since made considerable additions to it: and the present impression of his mind is rather to publish a new edition of this little work, with the addition of his notes, than to withhold from the profession a book more valuable, and more useful, than any he could substitute; and he will take an early opportunity of publishing this little work, and, by that means, supply the deficiency which may appear in the present publication.

The present publication is intended to consist of two volumes.

The volume now offered to the profession embraces the following subjects:

Common Recovery,

Recovery Deed,

Fines,

And an Appendix of Forms of Recovery Deeds.

The next volume, (which, with the excep-

tion of the first chapter, is ready for the press,) will include the heads,

Deeds to lead and Deeds to declare the Uses of Fines.

Leases,

Lease and Release,

Appointments,

Bargain and Sale,

Assignments of Choses en Action,

———— of Terms,

———— of attendant Terms,

Surrenders, and Merger as connected with that learning.*

When the author shall have leisure to finish another volume, it will comprise practical observations on

Purchase Deeds,

Settlements,

Wills, &c.

The author has endeavoured as well to form the judgment of the student to the point of title, and enable him to give an opinion on a deed already prepared, as to prepare one with skill.

To complete a regular course of study on practical subjects, the author has begun and made considerable progress with a trea-

* It is more than probable that these heads will require two volumes.

tise on Abstracts of Title. This treatise will be of considerable length, and to finish it, in the manner the subject deserves, will require great labour and research. It is intended in this work, to shew the points to be regarded in

1. Preparing an abstract,
2. Examining it,
3. Arranging it,
4. Advising on it,

And thus to detail the duty of the solicitor and of the counsel, in every branch of the profession. Throughout this work on Abstracts,* the author has availed himself of the result of all the practical information he has been able to collect in the course of twenty years' experience; and has endeavoured to teach the mind those modes and habits of arrangement, reflection, &c. by which the conveyancer is enabled to accomplish those objects, which are beyond the reach of any mind, unacquainted with the powers of combination, arrangement, classification, &c.

In the law, as in every other study, the principal end to be attained, is to gain simple ideas; and for this purpose to separate,

* This work on Abstracts is now published in 3 vols, royal 8vo.

and as occasion requires, again combine parts of a complex idea; to distinguish carefully and correctly; and to give to distinct objects the distinct ideas to which they are separately entitled. This indeed is the principal secret of all science, and distinguishes the great lawyer, from those who have read much and profited little,—who have blended together ideas totally distinct,—have learned cases without understanding their principle, in short, have confused, instead of informing themselves.

To teach the mode of doing this, as far as it can be taught, and as far as the author's feeble powers will enable him, was an object, thought deserving of the attempt; and the attempt was made in a series of lectures: and though the author feels how short he has fallen of perfection, his endeavors may call forth the exertions of some one more equal to the performance. While, in every other science, there has been a laudable exertion employed in simplifying the elements of science, and facilitating the attainment of knowledge, his object has been to assist in this plan, as far as it embraces the subject which has employed his attention, and occupied nearly all his time and all his thoughts, for full twenty years.

With the last work he wishes to conclude his labours; and if he shall find he has assisted others in their studies, he will feel abundantly gratified, in having fulfilled those duties he owes to the profession, as a return, and grateful tribute, for the liberal patronage with which his humble endeavours have been rewarded. Circumstances would have perfectly justified him in consulting his ease, rather than again appearing before the public, and exposing himself to censure or critical observation. Writing from the motive of doing good, and not of interest or vanity; sacrificing his own best comfort and convenience to a sense of duty; he will lament to find that he has failed of his object. He has no expectation that his labours are exempt from errors. From his own experience, he is well assured few books on the law can be expected to be free from criticism, and still less from difference of opinion, on practical points. As far as it has been in his power, he has endeavoured to lay himself open to correction. This has been done rather from an anxiety not to mislead, than from the fear of the lash of censure. From the liberality he has uniformly experienced, he is well assured, that, from those to whom he is known, he has nothing severe to apprehend.

They will pardon the error in weighing the motive, and will be satisfied that in treading on new ground, many errors were to be expected. All he can say, is, that he will be the first to correct any errors, the moment they shall be detected by himself, or communicated by others. His own justification will be in the fullest conviction, he has not omitted any opportunity of giving the best information in his power, to those whom he wishes to assist.

As this work was, for the most part, written without any previous collection of authorities, and without any concerted plan, it must in many instances be received as the opinion of the author on points of practice; and not as a collection of texts from decisions of approved authority. Though a reference is frequently made to decided cases, these have been added merely to afford the reader the opportunity of consulting some cases relating to the point. The great difficulty in many instances, has been to find authorities which would exactly support the author's position. This has happened from the circumstance, that the author has taken practical conclusions, rather than the determination of the point of any particular case: and in many instances, the observations are a

mere transcript of opinions given in the course of practice. From these observations, the reader will judge with caution, and give to the different propositions only that degree of credit which they shall, on a more extensive research into the law, and on a perusal of books of approved authority, be found to deserve.

A

TABLE OF LAW TERMS

FROM THE

Year 1726, *to the Present Time.*

A. D.	Terms.	Anno Regni.	Began.	Ended.
1726	Hilary	12 Geo. I.	Jan. 24	Feb. 12
——	Easter	——	April 27	May 23
——	Trinity	——	June 10	June 29
——	Michaelmas	13 Geo. I.	Oct. 24	Nov. 28
1727	Hilary	——	Jan. 23	Feb. 13
——	Easter	——	April 19	May 15
——	Trinity	13 Geo. I. and 1 Geo. II.*	June 2	June 21
——	Michaelmas	1 Geo. II.	Oct. 23	Nov. 28
1728	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	May 8	June 3
——	Trinity	2 Geo. II.	June 21	July 10
——	Michaelmas	——	Oct. 23	Nov. 28.
1729	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 23	May 19
——	Trinity	2 and 3 Geo. II.	June 6	June 25
——	Michaelmas	3 Geo. II.	Oct. 23	Nov. 28
1730	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 15	May 11
——	Trinity	3 and 4 Geo. II.	May 29	June 17
——	Michaelmas	4 Geo. II.	Oct. 23	Nov. 28
1731	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	May 5	May 31
——	Trinity	5 Geo. II.	June 18	July 7
——	Michaelmas	——	Oct. 23	Nov. 29

* George II. began his reign June 11th, 1727.

A. D.	Terms.	Anno Regni.	Began.	Ended.
1732	Hilary	5 Geo. II.	Jan. 24	Feb. 12
——	Easter	——	April 26	May 22
——	Trinity	5 and 6 Geo. II.	June 9	June 28
——	Michaelmas	6 Geo. II.	Oct. 23	Nov. 28
1733	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 11	May 7
——	Trinity	6 and 7 Geo. II.	May 25	June 13
——	Michaelmas	7 Geo. II.	Oct. 23	Nov. 28
1734	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	May 1	May 27
——	Trinity	8 Geo. II.	June 14	July 3
——	Michaelmas	——	Oct. 23	Nov. 28
1735	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 23	May 19
——	Trinity	8 and 9 Geo. II.	June 6	June 25
——	Michaelmas	9 Geo. II.	Oct. 23	Nov. 28
1736	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	May 12	June 7
——	Trinity	10 Geo. II.	June 25	July 14
——	Michaelmas	——	Oct. 23	Nov. 29
1737	Hilary	——	Jan. 24	Feb. 12
——	Easter	——	April 27	May 23
——	Trinity	10 and 11 Geo. II.	June 10	June 29
——	Michaelmas	11 Geo. II.	Oct. 24	Nov. 28
1738	Hilary	——	Jan. 23	Feb. 13
——	Easter	——	April 19	May 15
——	Trinity	11 and 12 Geo. II.	June 2	June 21
——	Michaelmas	12 Geo. II.	Oct. 23	Nov. 28
1739	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	May 9	June 4
——	Trinity	13 Geo. II.	June 22	July 11
——	Michaelmas	——	Oct. 23	Nov. 28
1740	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 23	May 19
——	Trinity	13 and 14 Geo. II.	June 6	June 25
——	Michaelmas	14 Geo. II.	Oct. 23	Nov. 28
1741	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 15	May 11
——	Trinity	14 and 15 Geo. II.	May 29	June 17
——	Michaelmas	15 Geo. II.	Oct. 23	Nov. 28
1742	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	May 5	May 31
——	Trinity	16 Geo. II.	June 18	July 7
——	Michaelmas	——	Oct. 23	Nov. 29
1743	Hilary	——	Jan. 24	Feb. 12
——	Easter	——	April 20	May 16
——	Trinity	16 and 17 Geo. II.	June 3	June 22
——	Michaelmas	17 Geo. II.	Oct. 24	Nov. 28
1744	Hilary	——	Jan. 23	Feb. 13
——	Easter	——	April 11	May 7

A. D	Terms.	Anno Regni.	Began.	Ended.
1744	Trinity	17 and 18 Geo. II.	May 25	June 13
——	Michaelmas	18 Geo. II.	Oct. 23	Nov. 28
1745	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	May 1	May 27
——	Trinity	19 Geo. II.	June 14	July 3
——	Michaelmas	——	Oct. 23	Nov. 28
1746	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 16	May 12
——	Trinity	19 and 20 Geo. II.	May 30	June 18
——	Michaelmas	20 Geo. II.	Oct. 23	Nov. 28
1747	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	May 6	June 1
——	Trinity	21 Geo. II.	June 19	July 8
——	Michaelmas	——	Oct. 23	Nov. 28.
1748	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 27	May 23
——	Trinity	21 and 22 Geo. II.	June 10	June 29
——	Michaelmas	22 Geo. II.	Oct. 24	Nov. 28
1749	Hilary	——	Jan. 23	Feb. 13
——	Easter	——	April 12	May 8
——	Trinity	22 and 23 Geo. II.	May 26	June 14
——	Michaelmas	23 Geo. II.	Oct. 23	Nov. 28
1750	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	May 2	May 28
——	Trinity	24 Geo. II.	June 15	July 4
——	Michaelmas	——	Oct. 23	Nov. 28
1751	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 24	May 20
——	Trinity	24 and 25 Geo. II.	June 7	June 26
——	Michaelmas	25 Geo. II.	Oct. 23	Nov. 28
1752	Hilary	——	Jan. 23	Feb. 13
——	Easter	——	April 15	May 11
——	Trinity	25 and 26 Geo. II.	May 29	June 17
——	Michaelmas	26 Geo. II.	Nov. 6	Nov. 28
1753	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	May 9	June 4
——	Trinity	27 Geo. II.	June 22	July 11
——	Michaelmas	——	Nov. 6	Nov. 28
1754	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	May 1	May 27
——	Trinity	28 Geo. II.	June 14	July 3
——	Michaelmas	——	Nov. 6	Nov. 28
1755	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 16	May 12
——	Trinity	28 and 29 Geo. II.	May 30	June 18
——	Michaelmas	29 Geo. II.	Nov. 6.	Nov. 28
1756	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	May 5	May 31
——	Trinity	30 Geo. II.	June 18	July 7
——	Michaelmas	——	Nov. 6	Nov. 29

A. D.	Terms.	Anno Regni.	Began.	Ended.
1757	Hilary	30 Geo. II.	Jan. 24	Feb. 12
——	Easter	——	April 27	May 23
——	Trinity	30 and 31 Geo. II.	June 10	June 29
——	Michaelmas	31 Geo. II.	Nov. 7	Nov. 28
1758	Hilary	——	Jan. 23	Feb. 13
——	Easter	——	April 12	May 8
——	Trinity	31 and 32 Geo. II.	May 26	June 14
——	Michaelmas	32 Geo. II.	Nov. 6.	Nov. 28
1759	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	May 2	May 28
——	Trinity	33 Geo. II.	June 15	July 4
——	Michaelmas	——	Nov. 6	Nov. 28
1760	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 23	May 19
——	Trinity	33 and 34 Geo. II.	June 6	June 25
——	Michaelmas	1 Geo. III.	Nov. 6	Nov. 28
1761	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 8	May 4
——	Trinity	——	May 22	June 10
——	Michaelmas	2 Geo. III.	Nov. 6	Nov. 28
1762	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 28	May 24
——	Trinity	——	June 11	June 30
——	Michaelmas	3 Geo. III.	Nov. 6	Nov. 29
1763	Hilary	——	Jan. 24	Feb. 12
——	Easter	——	April 20	May 16
——	Trinity	——	June 3	June 22
——	Michaelmas	4 Geo. III.	Nov. 7	Nov. 28
1764	Hilary	——	Jan. 23	Feb. 13
——	Easter	——	May 9	June 4
——	Trinity	——	June 22	July 11
——	Michaelmas	5 Geo. III.	Nov. 6	Nov. 28
1765	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 24	May 20
——	Trinity	——	June 7	June 26
——	Michaelmas	6 Geo. III.	Nov. 6	Nov. 28
1766	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 16	May 12
——	Trinity	——	May 30	June 18
——	Michaelmas	7 Geo. III.	Nov. 6	Nov. 28
1767	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	May 6	June 1
——	Trinity	——	June 19	July 8
——	Michaelmas	8 Geo. III.	Nov. 6	Nov. 28
1768	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 20	May 16
——	Trinity	——	June 3	June 22
——	Michaelmas	9 Geo. III.	Nov. 7	Nov. 28
1769	Hilary	——	Jan. 23	Feb. 13
——	Easter	——	April 12	May 8

A. D.	Terms.	Anno Regni.	Began.	Ended.
1769	Trinity	9 Geo. III.	May 26	June 14
——	Michaelmas	10 Geo. III.	Nov. 6	Nov. 28
1770	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	May 2	May 28
——	Trinity	——	June 15	July 4
——	Michaelmas	11 Geo. III.	Nov. 6	Nov. 28
1771	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 17	May 13
——	Trinity	——	May 31	June 19
——	Michaelmas	12 Geo. III.	Nov. 6	Nov. 28
1772	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	May 6	June 1
——	Trinity	——	June 19	July 8
——	Michaelmas	13 Geo. III.	Nov. 6	Nov. 28
1773	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 28	May 24
——	Trinity	——	June 11	June 30
——	Michaelmas	14 Geo. III.	Nov. 6	Nov. 29
1774	Hilary	——	Jan. 24	Feb. 12
——	Easter	——	April 20	May 16
——	Trinity	——	June 3	June 22
——	Michaelmas	15 Geo. III.	Nov. 7	Nov. 28
1775	Hilary	——	Jan. 24	Feb. 13
——	Easter	——	May 3	May 29
——	Trinity	——	June 16	July 5
——	Michaelmas	16 Geo. III.	Nov. 6	Nov. 28
1776	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 24	May 20
——	Trinity	——	June 7	June 26
——	Michaelmas	17 Geo. III.	Nov. 6	Nov 28
1777	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 16	May 26
——	Trinity	——	May 30	June 18
——	Michaelmas	18 Geo. III.	Nov. 6	Nov. 28
1778	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	May 6.	June 1
——	Trinity	——	June 19	July 8
——	Michaelmas	19 Geo. III.	Nov. 6	Nov. 28
1779	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 21	May 17
——	Trinity	——	June 4	June 23
——	Michaelmas	20 Geo. III.	Nov. 6	Nov. 29
1780	Hilary	——	Jan. 24	Feb. 12
——	Easter	——	April 12	May 8
——	Trinity	——	May 26	June 14
——	Michaelmas	21 Geo. III.	Nov. 6	Nov. 28
1781	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	May 2	May 28
——	Trinity	——	June 15	July 14
——	Michaelmas	22 Geo. III.	Nov. 6	Nov. 28

A. D.	Terms.	Anno Regni.	Began.	Ended.
1782	Hilary	22 Geo. III.	Jan. 23	Feb. 12
——	Easter	——	April 17	May 13
——	Trinity	——	May 31	June 19
——	Michaelmas	23 Geo. III.	Nov. 6	Nov. 28
1783	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	May 7	June 2
——	Trinity	——	June 20	July 9
——	Michaelmas	24 Geo. III.	Nov. 6	Nov. 28
1784	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 28	May 24
——	Trinity	——	June 11	June 30
——	Milchaelmas	25 Geo. III.	Nov. 6	Nov. 29
1785	Hilary	——	Jan. 24	Feb. 12
——	Easter	——	April 13	May 9
——	Trinity	——	May 27	June 15
——	Milchaelmas	26 Geo. III.	Nov. 7	Nov. 28
1786	Hilary	——	Jan 23	Feb. 13
——	Easter	——	May 3	May 29
——	Trinity	——	June 16	July 5
——	Milchaelmas	27 Geo. III.	Nov. 6	Nov. 28
1787	Hilary	——	Jan 23	Feb. 12
——	Easter	——	April 25	May 21
——	Trinity	——	June 8	June 27
——	Michaelmas	28 Geo. III.	Nov. 6	Nov. 28
1788	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 9	May 5
——	Trinity	——	May 23	June 11
——	Michaelmas	29 Geo. III.	Nov. 6	Nov. 28
1789	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 29	May 25
——	Trinity	——	June 12	July 1
——	Michaelmas	30 Geo. III.	Nov. 6	Nov. 28
1790	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 21	May 17
——	Trinity	——	June 4	June 23
——	Michaelmas	31 Geo. III.	Nov. 6	Nov. 29
1791	Hilary	——	Jan. 24	Feb. 12
——	Easter	——	May 11	June 6
——	Trinity	——	June 24	July 13
——	Michaelmas	32 Geo. III.	Nov. 7	Nov. 28
1792	Hilary	——	Jan. 23	Feb. 13
——	Easter	——	April 25	May 21
——	Trinity	——	June 8	June 27
——	Michaelmas	33 Geo. III.	Nov. 6	Nov. 28
1793	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 17	May 13
——	Trinity	——	May 31	June 19
——	Michaelmas	34 Geo. III.	Nov. 6	Nov. 28
1794	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	May 7	June 2

A. D.	Terms.	Anno Regni.	Began.	Ended.
1794	Trinity	34 Geo. III.	June 20	July 9
——	Michaelmas	35 Geo. III.	Nov. 6	Nov. 28
1795	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 22	May 18
——	Trintiy	——	June 5	June 25
——	Michaelmas	36 Geo. III.	Nov. 6	Nov. 28
1796	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 13	May 13
——	Trinity	——	May 27	June 15
——	Michaelmas	37 Geo. III.	Nov. 7	Nov. 28
1797	Hilary	——	Jan. 23	Feb. 13
——	Easter	——	May 3	May 29
——	Trinity	——	June 16	July 5
——	Michaelmas	38 Geo. III.	Nov. 6	Nov. 28
1798	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 25	May 21
——	Trinity	——	June 8	June 27
——	Michaelmas	39 Geo. III.	Nov. 6	Nov. 28
1799	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 10	May 6
——	Trinity	——	May 24	June 12
——	Michaelmas	40 Geo. III.	Nov. 6	Nov. 28
1800	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 30	May 26
——	Trinity	——	June 13	July 2
——	Michaelmas	41 Geo. III.	Nov. 6	Nov. 28
1801	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 22	May 18
——	Trinity	——	June 5	June 25
——	Michaelmas	42 Geo. III.	Nov. 6	Nov. 28
1802	Hilary	——	Jan 23	Feb. 12
——	Easter	——	May 5	May 31
——	Trinity	——	June 18	July 7
——	Michaelmas	43 Geo. III.	Nov. 6	Nov. 29
1803	Hilary	——	Jan. 24	Feb. 12
——	Easter	——	April 27	May 23
——	Trinity	——	June 10	June 29
——	Michaelmas	44 Geo. III.	Nov. 7	Nov. 28
1804	Hilary	——	Jan. 23	Feb. 13
——	Easter	——	April 18	May 14
——	Trinity	——	June 1	June 20
——	Michaelmas	45 Geo. III.	Nov. 6	Nov. 28
1805	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	May 1	May 27
——	Trinity	——	June 14	July 3
——	Michaelmas	46 Geo. III.	Nov. 6	Nov. 28
1806	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 23	May 19
——	Trinity	——	June 6	June 25
——	Michaelmas	47 Geo. III.	Nov. 6	Nov. 28

A. D.	Terms.	Anno Regni.	Began.	Ended.
1807	Hilary	47 Geo. III.	Jan. 23	Feb. 12
——	Easter	——	April 15	May 11
——	Trinity	——	May 29	June 17
——	Michaelmas	48 Geo. III.	Nov. 6	Nov. 28
1808	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	May 4	May 30
——	Trinity	——	June 17	July 6
——	Michaelmas	49 Geo. III.	Nov. 7	Nov. 28
1809	Hilary	——	Jan. 23	Feb. 13
——	Easter	——	April 19	May 15
——	Trinity	——	June 2	June 21
——	Michaelmas	50 Geo. III.	Nov. 6	Nov. 28
1810	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	May 9	June 4
——	Trinity	——	June 22	July 11
——	Michaelmas	51 Geo. III.	Nov. 6	Nov. 28
1811	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	May 1	May 27
——	Trinity	——	June 14	July 3
——	Michaelmas	52 Geo. III.	Nov. 6	Nov. 28
1812	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 15	May 11
——	Trinity	——	May 29	June 17
——	Michaelmas	53 Geo. III.	Nov. 6	Nov. 28
1813	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	May 5	May 31
——	Trinity	——	June 18	July 7
——	Michaelmas	54 Geo. III.	Nov. 6	Nov. 29
1814	Hilary	——	Jan. 24	Feb. 12
——	Easter	——	April 27	May 23
——	Trinity	——	June 10	June 29
——	Michaelmas	55 Geo. III.	Nov. 7	Nov. 28
1815	Hilary	——	Jan. 23	Feb. 13
——	Easter	——	April 12	May 8
——	Trinity	——	May 26	June 14
——	Michaelmas	56 Geo. III.	Nov. 6	Nov. 28
1816	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	May 1	May 27
——	Trinity	——	June 14	July 3
——	Michaelmas	57 Geo. III.	Nov. 6	Nov. 28
1817	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 23	May 19
——	Trinity	——	June 6	June 25
——	Michaelmas	58 Geo. III.	Nov. 6	Nov. 28
1818	Hilary	——	Jan. 23	Feb. 12
——	Easter	——	April 8	May 4
——	Trinity	——	May 22	June 10
——	Michaelmas	59 Geo. III.	Nov. 6	Nov. 28

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A

PRACTICAL TREATISE

ON

CONVEYANCING.

CHAP. I.

OF COMMON RECOVERIES AND THEIR OPERATION, AND FORM OF RECOVERY DEEDS.

1. *Of Recoveries and their Operation.*

NO instrument prepared by the conveyancer requires more attention than this assurance.

It is to be considered principally as the assurance by which tenant in tail (*a*) may convert, or enlarge his estate-tail, into a fee-simple; or, more accurately speaking, (as will be afterwards shown) into a fee commensurate with the estate, which, at the time of creating the intail, was vested in the person by whom the intail was created, and thus bar the estate-tail, and all remainders and reversions expectant on that estate; [2]

(*a*) Pigot on Recoveries, passim.

and all conditions and collateral limitations annexed thereto (*b*), and charges *subsequent* to the same. The reason is stated 3 *Atk.* 591.

When the donor of the estate-tail has a fee-simple at the time of creating the estate-tail, the recovery of tenant in tail, duly suffered, will enlarge his estate-tail into a fee-simple. In those instances, however, in which the donor of the estate-tail had merely a determinable or defeasible fee, then, as is advanced on principle, the effect of a recovery by a tenant in tail, will be merely to give an interest commensurate with the ownership, under the base or defeasible fee. As a recovery by a tenant in fee (*c*) will not bar an executory devise or springing use annexed to that estate, it is absurd that the recovery of a tenant in tail, created out of this determinable fee, should have the effect to give an interest which could not have been acquired by the donor of the estate-tail. The same reasoning and a similar conclusion seem equally applicable to an estate-tail derived out of a qualified or defeasible estate in fee. In short, the recovery cannot produce any other effect, than to acquire that extent of ownership, which belonged to

(*b*) *Benson* v. *Hodson*. 1 Mod. 108. 2 Lev. 29. *Page* v. *Hayward*, 2 Salk. 570. Pigot on Recoveries, 176. *Driver* v. *Edgar*, Cowp. 379. Co. Litt. 327. b. *Gulliver* v. *Ashby*, Burr. 1929.

(*c*) *Pells* v. *Brown*, Cro. Ja. 590. Palm. 131. Fearne, 306. Pigot, 134.

the donor of the estate-tail. Let it be re- [3]
membered, however, that though the owner of an estate in fee, subject to an executory devise or springing use, cannot bar such future interest, a recovery by tenant in tail will bar an executory devise or springing use annexed to his estate. Such executory devise or springing use falls within the terms condition subsequent, or collateral limitation (*d*).

From these deductions it is to be considered, in case a tenant in tail creates an estate-tail, and the second donee suffers a common recovery, this recovery will bar the issue under the second intail, and also the donor of that intail; but will not be a bar to the title of the issue under the first intail.

A passage in Co. Lit. 327 b. that if "A. "maketh a gift in tail to B., who maketh "a gift in tail to C., C. maketh a feoff- "ment in fee, and dieth without issue, B. "hath issue and dieth, the issue of B. shall "enter; for albeit the feoffment of C. did "discontinue the reversion of the fee sim- "ple which B. hath gained upon the estate- "tail made to C. not yet could it discon- "tinue the right of intail which B. had, "which was discontinued before: and, there-

(*d*) *Pells* v. *Brown*, Cro. Jac. 590. Palmer 131. *Page & Hayward*, 2 Salk. 570, already cited, supra, p. 2.

" fore, when C. died without issue, then did " the discontinuance of the estate-tail of " B., which passed by his livery, cease, and " consequently the entry of the issue of B. " lawful," illustrates this doctrine.

And on this passage it is to be observed, 1st. That there is a discontinuance only for the time while C. shall live, and there shall be issue of his body. 2dly, It was not competent to C. or his issue to enlarge the discontinuance as against the issue of B., or as against A. or his heirs; for the discontinuance ceased on the failure of the issue of C. (*e*)

Thus also in a thing created *de novo*, as a rent, in which there is merely an estate-tail, without any remainder over, a recovery suffered of the rent by tenant in tail, though it may bar the estate-tail, cannot give to the rent a continuance beyond the period limited by the original grant (*f*). These points illustrate, and seem, in some degree, to prove the proposition now under consideration.

When, however, the estate-tail in a rent is derived out of a fee-simple already existing in the rent; or the estate-tail is limited on its first creation with remainders over, the recovery of tenant in tail, duly suffered,

(*e*) Co. Litt. 333. 3 P. Williams, 229. Butler's
(*f*) *Chaplin* v. *Chaplin*, Co. Litt. 298, a. n. 2.

will acquire the whole dominion or ownership in the rent to the extent of the estate-tail and remainders (*g*). The objection that there cannot be a remainder of a thing created *de novo*, no longer prevails (*h*). [4]

To bar an estate-tail and remainders and reversions, &c. expectant on that estate is the general use of a recovery: and in its operation, as barring the estates of persons in remainder, it is peculiarly the assurance of tenant in tail, and has this effect only when it is suffered by the *donee for the time being of that estate.*

The *assignee* of tenant in tail, in other terms, the owner of a base fee derived out of an estate-tail, is not qualified to suffer a recovery with effect (*i*). Nor is a person who has an estate to him and his heirs, so long as another shall have heirs of his body (*k*): such person has a *determinable fee*, and not an estate-tail.

Nor can the *issue* in tail suffer a common recovery in the life-time of the ancestor, so as to bar the estate-tail or remainders, or do more than bar themselves by estoppel.

Sometimes this assurance is used as a

(*g*) *Smith v. Farnaby*, Carter, 52. Siderfin, 285. *Weeks v. Peach*, Lutw. 1218.

(*h*) *Smith v. Farnaby*, and *Weeks v. Peach*, already cited.

(*i*) 2 Roll's Abr. 394. l. 41. Raym. 29.

(*k*) Pigot on Recoveries, 129. 1 Mod. 111.

means of barring a title of dower (*l*), or aliening the freehold or inheritance, or some other interest of a married woman (*m*); but
[5] it is never, at least among correct practitioners, used for these purposes, unless one of the objects of the assurance is to bar an estate-tail. A common recovery may also operate as a conveyance by any person who has an estate of inheritance, not being an estate-tail(*n*). It may extinguish a collateral interest, as a rent; or a lien, as a judgment; or a charge (*o*); or a power, as a power of jointuring (*p*), or of appointment (*q*), or a power to charge (*r*); or the right to bring a writ of error (*s*).

In these particulars it partakes, according to the circumstances, of the nature and operation of a conveyance, or of a release. Sometimes it operates merely by way of estoppel or conclusion. And in these instances it must be considered as such conveyance, release, or estoppel, rather than a common recovery requiring the forms of a real action. It may also be observed that the

(*l*) 2 Co. 74, 78. 10 Co. 43. *Eare* v. *Snow*, Plow. 504, 514. Pig. 67.

(*m*) Ib. and *Incledon v. Northcote*, 3 Atk. 430.

(*n*) 3 Co. 5. Pig. Rec. 123. *Webb* v. *Nect*, Cro. Eliz. 21. *Lockyer* v. *Palfreman*, Style 309. Pig. 198.

(*o*) *Duke of Chandos* v. *Talbot*, 2 P. Wms. 605.

(*p*) *King* v. *Melling*, 1 Ventr. 225. 2 Levinz. 58. Pig. Rec. 135.

(*q*) *Penn* v. *Peacock*, Ca. T. Talb. 41.

(*r*) *Saville* v. *Blackett*, 1 P. Wms. 777.

(*s*) *Barton* v. *Lever*, Cro. Eliz. 388. Moor, 365.

issue in tail, or those in reversion or remainder, not being parties, are not bound by *estoppels or conclusions*. Tenants in tail, as well as the owners of other estates, may, to the extent of their interest, considered as a *quasi* life interest, and also to the extent of their interest, as enlarged into a more extensive ownership, by means of a fine or recovery, bind themselves by estoppel. As recoveries do not operate by estoppel against [6] the issue, or those in reversion or remainder, a recovery suffered of the *land* will not bar an intail of a *rent* issuing out of the lands, as far as the issue or those in remainder or reversion are interested therein. But a recovery of the *land* suffered by a tenant in fee or for life of a *rent*, would *quoad* his estate extinguish the rent, and suffered by a tenant in tail, would bind himself. Nor will a recovery suffered by a person who has a *contingent* or *executory* interest *in tail*, either under a contingent remainder or executory devise (*t*), bar the intail or remainder by way of conveyance; where suffered by a person who has an executory interest *in fee*, it will, by way of release or estoppel, bar his interest and conclude his heirs. The estoppel will bind the person by whom the recovery was suffered, though he had an interest in

(*t*) Pigot on Recoveries, 133.

tail. And it well deserves consideration whether the effect of a recovery, by a person who has a *contingent* or *executory* interest *in tail*, is not, by *estoppel*, to preclude the intail from ever giving a *vested* estate. This point depends on first principles. No decision on the point has occurred, the decision in the case of *Nicholas Moore* (*u*) bears in some degree on the point.

When one estate-tail is derived out of another estate-tail, both estates-tail, or the right to both these estates, may centre in one and the same person ; and a recovery suffered by him, in which he shall be *vouched*, and vouch over, will bar both estates-tail (*x*), and consequently will confer an estate co-extensive with the ownership of the person by whom the original estate-tail was created. But a recovery suffered by him,
[7] in which he shall be named *tenant* (*y*), and vouch over, will bar that estate only of which he is actually seised, without affecting the title under the original estate-tail.

When the original estate-tail revives ; and the derivative estate-tail is defeated through the medium of the doctrine of *remitter* (*z*), then the title is to be considered precisely on the footing of the original es-

(*u*) Palm. 365.
(*x*) *Manxell's* case, 2 Plow. 8. b. 3. Co. 6.
(*y*) *Taltarum's* case, 12 Ed. IV. 14. Pig. on Rec. 9. Bro. Abr. Tail, 32.
(*z*) Litt. s. 659, 660. Co. Lit. 347, b.

tate-tail: and a recovery suffered, so as to bar that estate-tail, will enlarge the ownership into a fee-simple, admitting the fee-simple was in the person by whom the original estate-tail was created.

From these observations it will be collected, that when there are two estates-tail, and one of them is derived out of the other, and both subsisting in different persons, the owner of the original estate-tail must be a party in the recovery, in order to gain the title to the *fee-simple;* and to bar both estates-tail, both tenants in tail must be vouched. Whether they are to be vouched jointly or severally, will be considered under that division in which the necessity of a recovery with treble voucher will be the subject of observation.

An assurance by common recovery generally consists of two parts perfectly distinct:— [8]

First. Of the recovery, which assumes all the forms of a real action; and is founded on the supposition of an adverse claim: and,

Secondly. Of the recovery deed. And this deed is, in form at least, partly a preparatory step to suffering the recovery, and partly a declaration of the uses of the recovery when suffered.

Notwithstanding the recovery assumes the form of a real action, it is considered

merely as a common assurance, and the court take notice of it as such (*a*).

There are a variety of cases in which a common recovery is the only assurance which will complete the title. For example, a person who is tenant in tail, with remainders and reversions over to other persons, cannot, by his own act, and *ipso facto*, bar those remainders and reversions by a fine, or by any other means than a common recovery. These interests may be eventually barred by nonclaim (*b*), on a *fine* with proclamations; or by the *statute of limitation* (*c*). But this is by force of certain statutes, not of the direct operation of the assurance.

[9] Also a tenant in tail subject to a *springing or shifting use*, or *conditional limitation*; as an executory devise; cannot, even though he has the remainder or reversion, in fee, bar this springing or shifting use or conditional limitation by any other means than this assurance. But, as may be inferred from a former observation, tenant in fee, subject to an executory devise or conditional limitation, &c. cannot, by a common recovery, or by any other means, proceeding from himself alone, in short, without the concurrence of the other persons concerned in interest,

(*a*) *Pelham's* case, 1 Co. 14, b. 3 Bl. Com. 3 51. on Rec. 26.

(*b*) 4 Hen. 7, c. 24; and 32 Hen. 8, c. 36.

(*c*) 21 Ja. 1, c. 16.

bar such executory devise or conditional limitation (*d*).

And wherever tenant in tail has also the immediate remainder or reversion in fee, *by descent*, though *prima facie* a fine would enable him to acquire the fee-simple in possession, and render his title, unless it can be impeached, marketable (*e*), it is his interest, except under very particular circumstances, as apprehension of death, &c. before the term, to suffer a common recovery rather than levy a fine.

By means of the recovery his title will depend wholly on his estate-tail, and the remainder or reversion in fee will be immaterial to the further deduction of the title; and thus the investigation of the title will be abridged, by superseding the necessity of a long, and frequently troublesome, and expensive, investigation, respecting the state of title under the reversion, or remainder (*f*). While, if he levies a fine, he will [10] bar his estate-tail, and convert that estate into a base or determinable fee; and this fee will merge in the remainder or reversion in fee-simple: and all the charges and incumbrances, (as judgments, annuities, &c.) affecting the reversion or remainder in fee,

(*d*) *Pells v. Brown*, Cro. J. 590.

(*e*) *Sperling v. Trevor*, 7 Ves. jun. 497.

(*f*) Tracts on Cross Remainders, &c.

will be accelerated and become an immediate, instead of being a remote, charge on the possession. So also tenant in tail having the remainder or reversion in fee *by descent*, will become immediately chargeable with the debts of the ancestor, who was the owner of the remainder or reversion in fee-simple. Thus these incumbrances, instead of being barred, as they may be by a common recovery, will become an available charge.

On this subject the student should read with great attention, the cases of *Symonds* v. *Cudmore* (*g*), *Kynaston* v. *Clarke* (*h*), *Shelburne* v. *Biddulph* (*i*), and also the observations in the Tracts on Cross Remainders, and Alienations by Tenants in Tail.

The rule is clearly and fully established as to *legal estates*. In equity, the doctrine of merger is not of such universal application as at law; and it is questionable at least, whether that court, acting on a case of trust estates, would afford any relief to the incumbrancers, until the period for the commencement of the remainder or reversion has arrived, by the death of the tenant in tail and the failure of the issue inheritable to his estate.

On the effect of common recoveries in barring remainders, conditions, and collate-

(*g*) 4 Mod. 1. 2. Salk. 338. 1 Show. 370.
(*h*) 2 Atk. 204.
(*i*) 4 Bro. P. C. 594.

ral limitations, the cases of *Page* v. *Hayward* (*k*), *Gulliver* v. *Shuckburg Ashby* (*l*), *Driver* v. *Edgar* (*m*), and *Benson* v. *Hodson* [11] (*n*), should be closely studied.

On the authority and reasoning of the determination in *Symonds* v. *Cudmore*, *Kynaston* v. *Clarke*, *Shelburne* v. *Biddulph*, it should be understood as a general rule, to be observed in practice, that a tenant in tail, who is merely tenant in tail, or who has the reversion or remainder in fee by descent, should suffer a common recovery, in preference to levying a fine. And if he levies a fine, to guard against the accident of his death, before the commencement of the term, the fine should be levied for the *declared* purpose of making a tenant to the writ of entry; and to the intent of suffering a common recovery: so that the fine and common recovery, if one shall be suffered, may form parts of the same assurance (*o*), and thus prevent, (as beyond all doubt they will do,) the merger of the ownership under the estate-tail, in the reversion or remainder in fee; or, in other words, make the title dependent

(*k*) 2 Salk. 570.
(*l*) 4 Burr. 1929.
(*m*) Cowp. 370.
(*n*) 1 Mod. 108.
(*o*) *Ferrors and Curson* v. *Fermor*, Cro. Ja. 643.
Goodright v. *Mead*, 3 Burr. 703.
Selwyn v. *Selwyn*, 2 Burr. 1131.
Taylor v. *Horde*, 1 Burr. 60.
Havergill v. *Hare*, Cro. Ja. 510.
Cromwell's case, 2 Rep. 74.
Herring v. *Brown*, Vent. 368.

wholly on the ownership under the estate-tail.

In some cases, especially when there are heavy debts, or there is the apprehension of
[12]judgments, &c. affecting the reversion or remainder in fee, and a fine is to be levied, it will be a caution, well worth the expence, previous to levying the fine, to make a demise for years to be created in the name of a trustee, upon trust to attend the inheritance; and to protect the possession during the continuance of the ownership under the estate-tail; for the term being supplied partly from the estate-tail, and partly from the remainder or reversion in fee, will not be affected by the subsequent merger, should it take place, of the estate-tail; but would protect the possession during the time of the estate-tail, viz. till the failure of the issue inheritable under the estate-tail.

The demise generally used to prevent a forfeiture, in those cases in which it is doubtful whether the party is tenant for life or tenant in tail, and of which there is a form in the *appendix*, would, with very little alteration, answer this purpose; but it has not occurred to the writer of these observations to remark that this caution has ever been adopted in practice.

Observations on the Operation of Fines as distinguished from Recoveries. [13]

To elucidate the remarks on the extensive operation of recoveries, as distinguished from fines, and to show the application of these remarks to practice, a few general observations may be added in this place.

It is quite clear that a tenant in tail, merely as such, cannot make a good title to the fee-simple, without suffering a common recovery. A fine levied by him, and operating as a conveyance, will only bar the estate-tail, and convert the same into a base or determinable fee (*p*). But if it operates by discontinuance, then a fee-simple will be gained: yet such fee-simple may be avoided by the action of those in reversion or remainder; or they may be even remitted to their estate by operation of law. When however a person who has an estate-tail, with an immediate reversion in fee, levies a fine with proclamations, the effect of the fine will be to bar the estate-tail, and convert that estate into a determinable fee; and this determinable fee will merge in the fee-simple. The consequences are, 1st, the title

(*p*) *Machell* v. *Clarke*, 2 Lord Raym. 778.
Seymour's case, 10 Co. 95.
Doe v. *Whitehead*, 2 Burr. 704.
Doe v. *Rivers*, 7 Term Rep. 276.
Doe v. *Wichelo*, 8 Term Rep. 211.

[14] depends partly under the ownership of the estate-tail, and partly under the ownership of the reversion in fee; 2dly, the reversion, having become an estate in possession, the possession is immediately chargeable with all incumbrances which affected the reversion or remainder in fee. For this reason it is considered a rule of practice, by all sound lawyers, that a tenant in tail with reversion or remainder in fee by descent, should suffer a common recovery instead of levying a fine. And it certainly is the interest of every seller who has a title thus circumstanced, to suffer a common recovery, rather than rely on the operation of a fine. It is also the interest of the purchaser, that a common recovery should be suffered, so that the evidence of the title may depend wholly on the ownership under the estate-tail, instead of being deduced, as it otherwise must be, as well under the ownership of the reversion in fee, as of the estate-tail. At the same time let it be observed that it is now settled by the case of *Sperling* v. *Trevor* (*q*) that a title derived under a fine levied by tenant in tail, with the reversion in fee by descent, is, *prima facie* good: and a purchaser cannot object to the title for want of a common
[15] recovery; unless he can show that the reversion in fee has been aliened or incumbered.

(*q*) 7 Ves. p. 497.

The purchaser however has a clear right to have a recovery suffered by the vendors at his own expence.

The covenant for further assurance inserted in purchase deeds fully proves the right; for as the purchaser may require a recovery immediately after the completion of the purchase, he may, as a necessary result of that right, require from the vendors that they should convey by recovery as part of the assurance to the purchaser when completing his purchase. He has also a right, unless a recovery shall be suffered, to have the title deduced from each successive owner, who for the time being has been seised of the reversion in fee; and for this purpose to call for an abstract of the wills of such of them as have left wills affecting real estates, and for presumptive evidence of the intestacy, (as letters of administration, or the like,) of such of them as are alledged to have died intestate. To satisfy a purchaser on these points will frequently be attended with more delay, and in general with more expence than a common recovery. For this reason, independent of the advantages which, in reference to the covenants warranting the title, arise to the seller from a recovery, it rarely happens among gentlemen of any experience, that a seller is ad-

vised to place the title on the operation of a fine, or withhold his consent to suffer a common recovery. And in many cases, and indeed in all cases of considerable property, a recovery is attended with less expence than a fine.

General Observations continued.

[16] It may be observed, that a tenant in tail cannot, by his common recovery, or by any other means, bar leases, charge, &c. which are incumbrances on his estate-tail. All charges affecting him as tenant in tail will affect his ownership under the fee acquired from the estate-tail (*r*), nor can he bar any estate or interest prior to his estate-tail (*s*).

But the tenant of a remote estate-tail may, when qualified by the assistance of the owner of the *immediate freehold*, and notwithstanding there are prior estates-tail, vested or contingent, suffer a common recovery with effect. The operation of this recovery will be to enlarge his own estate-tail, into a fee-simple, by barring all remainders and reversions expectant on his estate-tail (*t*).

(*s*) *Capel's* case, 1 Co. 62, a *Cholmley's* case, 2 Co. 52, b. *Beck* v. *Welsh*, 1 Wils. 277. *Benson* v. *Hodson*, 1 Mod. 108. (*s*) Pigot, 139. 2 Lev. 30. *Goddard* v. *Complin*, 1 Ch. Ca. 119.

(*t*) 3 Co. 6, a. *Doe* v. *Halley*, 8 T. Rep. 5.

It will, however, leave the prior estates, and among them estates-tail, if any, (unless they are destroyed as contingent remainders,) undisturbed. And at a subsequent [17] period, a recovery may be suffered by the owner of the prior estate-tail, and the recovery thus suffered will enlarge this prior or intermediate estate-tail into a fee-simple, and, as a consequence, bar the fee acquired by means of the former recovery.

It must always be remembered that the owner of a remote estate-tail cannot suffer an effectual recovery, without the concurrence of the owner of the immediate estate of freehold; or unless he himself be the owner of that estate.

Nor can a tenant in tail by his recovery acquire an estate more ample than that which was vested in the person by whom the estate-tail was created. This point has already been urged. Therefore, when the person by whom the estate-tail was created, had a *determinable* or *defeasible* fee, the fee acquired, by means of the recovery, will be subject to the collateral limitation, or condition, &c. of the fee, while that collateral limitation or condition continues in force. No decision has been found to warrant this proposition, and yet no doubt can reasonably be entertained on the point.

It remains to be observed that estates *pour*

autre vie, or for several lives, do not admit of intails within the statute *de donis* (*u*). Limitations of these interests to a man and the heirs of his body do not create estates-tail, barrable by recovery *as such*. They create merely a *quasi intail*, which, with the limita-
[18] tions over, may be barred by an ordinary alienation (*v*), as fine, lease and release (*w*), bargain and sale, grant, surrender (*x*), or in equity by articles (*y*), and it should seem (for this point is not decided) by will (*z*).

And tenant in tail of the gift of the crown (*zz*), for services performed (*a*), cannot bar either his issue, or the reversion or remainder in fee of the crown, while that reversion or remainder remains in the crown. The protection continues only so long as the reversion or remainder in fee is in the crown (*b*).

From the moment the crown parts with the reversion or remainder in fee, the estates-tail and other estates expectant thereon,

(*u*) *Low* v. *Burron*, 3 P. W. 262.

(*v*) *Wasteney's* v. *Chapple*, 1 Bro. Par. Ca. 457.

(*w*) *Duke of Grafton* v. *Hanmer*, 3 P. W. 266, note. *Norton* v. *Frecker*, 1 Atk. 524.

(*x*) *Baker* v. *Bayley*, 2 Vern. 225. *Blake* v. *Blake*, 3 Cox's P. W. 10, n. 1.

(*y*) *Wasteney's* v. *Chapple*, 1 Bro. Par. Ca. 457. & 1 Atk. 524.

(*z*) *Doe* v. *Luxton*, 6 T. Rep. 293.

(*zz*) Stat. 34 and 35 H. VIII. c. 20. Co. Litt. 372, b. 2 Show. 119.

(*a*) *Perkins v. Sewell*, 1 Black. Rep. 654. 4 Burr. 2223.

(*b*) Co. Litt. 372, b.

lose the protection of this statute against being barred (*c*).

At this day, it is observable, the crown cannot alien the reversion or remainder in fee by any other means than an act of parliament.

And particular estates, derived out of the reversion or remainder of the crown, are within the protection of the statute, so long as the crown retains the reversion or remainder (*d*). [19]

And by the prerogative of the crown a reversion or remainder in the crown, either in fee or in tail, cannot be barred by a common recovery of tenant in tail (*e*); but remainders to strangers may be barred, whether they are prior or subsequent to the estate of the crown (*f*).

The origin of this protection to the crown cannot be accounted for on any other ground than a principle of tenure, that the estate of the crown is part of its ancient dominion; and that as against the crown, the tenant in tail is in the same predicament, as if his estate were derived out of a base

(*c*) Com. Dig. Estates, B. 31. Co. Litt. 372, b. 2 Show. 124.

Earl of Chesterfield's case, Hard. 409.

(*d*) Com. Dig. Estates. B. 31. 8 Co. 77. Co. Litt. 372.b.

(*e*) 2 Roll. Abr. 393. *Serjeant's* case.

Neale ex demise Athol v. *Wilding*. 1 Wilson 275.

(*f*) 2 Roll Abr. 393. *Serjeant's* case. 2 Show. 119. seems contra.

or determinable fee, or an estate subject to a condition.

Nor can a woman seised in tail by the provision of the husband, or any of his ancestors, or by his or their procurement (*g*), bar the estate-tail, or the reversion or remainder, after the death of the husband, without the concurrence of the person next in remainder, or next inheritable. This regulation is founded on the enactments of the statute-law. The statute extends to all cases in which the wife is tenant in tail, either alone (*h*), or jointly with her husband (*i*). It embraces those cases also in which the gift is to the heirs of both their bodies (*k*), or to the heirs of her body, begotten by him (*l*), provided the intail proceeds from the husband, or some of his ancestors (*m*), or the lands were purchased with his money (*n*), or partly with his money. It also extends not only to all cases in which the gift is confined to *his issue* (*o*); but to those cases in which the gift is to the heirs of the body of the wife, generally, with a remainder or reversion in favor of the husband, or

(*g*) Stat. of 11 Hen. VII. c. 20.

(*h*) See the statute.

(*i*) *Laughter* v. *Humphrey*, Cro. Eliz. 524.

Queen v. *Savage*, Moor. 715.

(*k*) See the statute.

(*l*) See the statute.

(*m*) *Sharrington* v. *Scrotton*, Plow. 300. 3 Co. 50, b. Cro. Eliz. 513.

(*n*) Palmer, 217.

(*o*) *Foster* v. *Pitfal*, Cro. Eliz, 2, 524.

some of his ancestors (*o o*). The statute also comprehends those cases, in which the settlement, though in consideration of money of the wife, has marriage as the principal inducement (*p*).

But it does not extend to those cases in which the gift proceeds from the wife (*q*), or from her friends, or from a stranger (*r*); or where the lands are purchased with the money of the the wife, unless marriage be the principal consideration; nor to those cases in which she has an estate in general tail (*s*), that is to say, to the heirs of her body generally, with the remainder or reversion in fee to herself or a stranger (*t*).

It is also now settled that an alienation by the husband and wife jointly (*u*), is not restrained by the statute, though it is not within the express words of the saving clause. And after the death of the husband, she may alien with the consent of the heir in[21] tail (*v*), if there be any, and if none, with the consent of the person who has the first estate of inheritance in remainder or rever-

(*oo*) *Simpson* v. *Turner*, Eq. Abr. 220.

(*p*) *Villars* v. *Beaumont*, Dyer, 146, a.

(*q*) *Eyston* v. *Studd*, Plow. 463.

(*r*) *Ward* v. *Walthew*, Cro. Jac. 173.

(*s*) *Foster* v. *Pitfal*, Cro. Eliz. 2. 524.

(*t*) *Simpson* v. *Turner*, Eq. Ab. 220.

(*u*) *Kirkman* v. *Thomson*, Cro. Jac. 474.

(*v*) *Lincoln Coll.* Ca. 3 Co. 58. see the stat. s. 8, 9.

sion (*w*), but such consent must appear on record, or by inrolment. And she as being tenant in tail must be vouched or must be one of the vouchees. And it seems, on principle, that one of several expectant coheirs may assent for her share. So that in effect, though not in form, the recovery proceeds from the concurrence of the heir in tail, or those in reversion or remainder, rather than from the wife. There is a difference between an alienation by a woman tenant in tail, of the gift of her husband, or his ancestors, and an alienation by a husband tenant in tail jointly with his wife or by survivorship. The widow cannot bar the issue; the husband may, even though the wife be living. By the stat. of 32 H. VIII. c. 28, those discontinuances only of the husband which do not bar the issue are provided for (*x*). As in all other cases, tenant in tail can bar the remainder or reversion in fee expectant on his estate-tail, he can bar all leases, estates, and charges derived out of that remainder or reversion in fee (*y*), and all charges subordinate to his estate-tail (*z*)

[22] And a recovery duly suffered by a tenant in tail, after a conveyance or settlement

(*w*) Cro. Eliz. 514.
(*x*) *Greneley's* Ca. 8 Co. 72.
(*y*) *Capel's* case, 1 Co. 60. *Goodright* v. *Mead and Shilston*, 3 Burr. 1703.
Cheney v. *Hall*, Amb. 526. *Stapleton* v. *Stapleton*, 1 Atk. 2.
(*z*) *Eyton* v. *Eyton*, 1 Bro. Par. Ca. 151.

made by him, will bar the estate-tail, and all remainders expectant on that estate, so as to give effect to the conveyance or settlement, as against his issue and those in remainder or reversion (*a*).

Of Recoveries of Equitable Estates.

Recoveries may be divided into recoveries of the legal, and recoveries of the equitable ownership; these recoveries are generally distinguished as legal and equitable recoveries.

It is necessary to attend to this distinction only, for the purpose of introducing a few observations, applicable, in a particular manner, to equitable recoveries.

The general rule is, that equitable recoveries must be suffered with the same ceremonies, and by the same persons, as equitable owners, whose concurrence would be necessary in case their estates were legal, instead of being equitable (*b*). It is also a rule that a recovery by the owner of an equitable estate, will not bar a remainder in the owner of a legal estate (*c*).

(*a*) See the cases cited in n. (*y*) above.

(*b*) *North* v. *Champernown*, 2 Ch. Ca. 63, 78.

(*c*) *Salvin* v. *Thornton*, Ambl. 545, 699. 1 Bro. Ch. Ca. 73 in nota.

Phillips v. *Brydges*, 3 Ves. jun. 120.

Boteler v. *Allington*, 1 Bro. Ch. Ca. 72.

In *Wynne* v. *Cookes*, (*c a*)

(*c a*) 1 Bro. C. C. 515.

[23] That the recovery of an equitable tenant in tail may complete the title to the fee-

a copyholder for life, with limitations over in tail, enfranchised, and devised to his wife; who entered, claiming the lands. Freehold lands were also entailed. And while the wife was in possession, claiming adversely, the first tenant in tail made a bargain and sale, and suffered a common recovery of all the manors, &c. devised by the will. He died, and the next remainderman filed a bill, claiming the benefit of the enfranchisement, and had a decree for a conveyance to the uses of the will. The plaintiff died. And the next in tail claimed to be entitled; and he and the widow, (the trustee by the declaration of the decree,) conveyed to the use of the tenant in tail. And afterwards the tenant in tail executed conveyances to make a tenant, &c. and a recovery was suffered, and he devised. *Eyre*, Baron, was of opinion that the first tenant in tail not having been in possession of the estate in question, when the recovery was suffered, it had no operation on that estate; that the last remainderman was therefore seized in tail male; that the recovery suffered by him barred the intail, and the estate was, therefore, well devised by his will, and decreed accordingly.

N. B. This case seems to have deserved further consideration.

And in *Piggott* v. *Waller*, (*c b*) Robert Piggott, being seised in fee of two third parts of the manor of Chesterton, devised his manor of Chesterton to trustees, so as to vest in them the legal fee, upon trust, after various other dispositions, for his eldest son Robert Piggott for life, remainder to his first and other sons in tail male, remainder to testator's right heirs.

After the date of the will the testator purchased the remaining third part of the manor, and made a subsequent codicil, which the court construed to be a republication of the will.

Robert Piggott, the son, supposing the third part to have descended to him, devised it by his will, and died, leaving Robert Piggott, his eldest son, and William Piggott, his second son.

Robert Piggott, the grandson, after his father's death, suffered a recovery of the manor of Chesterton; and afterwards by deed confirmed the will of his father, and released to the trustees of that will the lands thereby devised; and afterwards purchased of the same trustee the third part of the said manor.

It was decided by *Grant*, master of the rolls, that the recovery barred the equitable intail in the whole of the manor, though it was objected that the person suffering the

(*c b*) 7 Ves. Jun. 98.

simple, the remainders must be of the equitable ownership. So also there must be the concurrence of the person who has the equitable freehold (*d*). On the two latter propositions, it is observable, however, that if the person who is the trustee for the tenant in tail, is trustee of the fee-simple, and has the equitable remainder in fee, this remainder, though for many purposes extinguished in the legal estate, is considered by a court of equity as an equitable interest, distinct from the legal estate, and liable to be barred by the recovery of the equitable tenant in tail, notwithstanding the legal estate is in the trustee (*e*); consequently the general rule must be understood of an equitable estate-tail, with a distinct legal estate in remainder, vested in some other person.

Again, although the owner of the equitable freehold must concur in suffering an equitable common recovery, it is no objection that this equitable ownership arises froma legal estate; and therefore, though A. be tenant for life of the legal estate, for his

recovery was not in possession, and did not intend to pass the whole by the recovery deeds.

And in *Lord Grenville* v. *Blyth* (*c c*) a recovery suffered by an equitable tenant in tail, was by *Grant*, master of the rolls, decreed to be valid, though the rents of the estate, at the time of the recovery, were paid by the trustees to other persons, under a decree, which was afterwards reversed.

(*c c*) 16 Ves. jun. 224.

(*d*) 2 Ch. Ca. 64.

(*e*) *Robinson* v. *Cumming*, Ca. T. Talb. 167. 1 Atk. 473.

own benefit, a recovery suffered by an equit-
[24] able tenant in tail, with his concurrence, will be good; since the analogy is sufficiently observed in obtaining the concurrence of the person who is the beneficial owner (*f*).

But it is quite clear that a recovery cannot be suffered by the owner of the legal estate-tail, without obtaining the concurrence of the person who has the legal freehold (*g*). And therefore as often as a recovery is to be suffered by the owner of the legal estate-tail, care must be taken to obtain the concurrence of the person in whom the legal estate of freehold resides; and if it be outstanding in a mortgagee or trustee, such mortgagee or trustee must be a party.

When a recovery is to be suffered of an equitable estate-tail, and the tenant in tail has made a mortgage by means of a conveyance in fee, or for an estate of freehold, it is doubtful whether a recovery afterwards suffered by the tenant in tail without the concurrence of the mortgagee can be supported. On the one hand, it is contended that the mortgagee has, *in equity*, merely a chattel interest, by way of security for his money, and that the whole beneficial ownership, subject to the pay-

(*f*) *Phillips* v. *Brydges*, 3 Ves. jun. 120. Amb. 545, 699. 1 Bro. Ch. Ca. 73, in notis.

(*g*) *Salvin* v. *Thornton*,

ment of the money, remains in the mortga- [25]
gor: so that he is competent to make a good tenant of the equitable freehold. Such is understood to be the opinion of a highly distinguished law character. On the other hand it is objected that the mortgage is, in equity, an alienation of the equitable freehold; so that the mortgagee has the equitable estate, subject only to redemption: and that the analogy of the rules of law, with regard to legal estates, must be applied to this case, and consequently the recovery cannot be good without the concurrence of the mortgagee. This was the opinion of a very eminent lawyer, who now fills one of the highest departments in the profession.

In suffering a recovery it would be highly imprudent to subject the title to an objection by neglecting to obtain the concurrence of the mortgagee. The point is important only in considering, whether a recovery suffered without this precaution will confer a title which can be safely accepted.

On the other hand, a recovery suffered by [26]
a tenant in tail of a legal estate, with the assistance and concurrence of the tenant of the legal estate of freehold, will certainly be good at law, notwithstanding the owner of the equitable freehold does not join in making the tenant to the writ of entry.

Whether the trustee will not be guilty of a breach of trust, for lending his assistance to the tenant in tail to bar the remainders over, is a point not fully decided. Even the late case of *Moody* v. *Walters* (*i*), has left this important point in as much doubt as existed prior to that cause. Much, perhaps, must depend upon circumstances; and circumstance must be considered as having governed the decision in *Moody* v. *Walters*; but, in application to most cases, the recovery will be considered as good.

Sometimes a question arises under other circumstances besides those already noticed, whether there is a good tenant to an equitable recovery. In one case the tenant of the legal estate, conveyed, at the instance and with the consent of the owner of the equitable estate, and it was the opinion of several gentlemen who were consulted on this point, and among them, the late
[27] Mr. *Fearne*, that this amounted to an alienation of the equitable estate, making a good tenant to the writ of entry for suffering the equitable recovery. In another case, the legal tenant of copyhold lands, surrendered to the use of the person named tenant in the plaint, for suffering a customary recovery, and the equitable tenant in tail was vouched and vouched over. The point for conside-

(*i*) 16 Ves. jun. 283.

ration on the title was, whether the equitable tenant in tail, by being vouched, and by having procured the surrender to be made by his trustee, without having been party to the surrender, had given a right to the equitable estate of freehold to the intended tenant in the recovery. The title thus circumstanced was considered too doubtful to be accepted, but, individually, the gentlemen who considered this case thought there were strong grounds for supporting the recovery.

The like point arises, when *a cestui que trust* conveys his estate to one person for life in trust for another, as for the separate use of a married woman, with remainders over in tail: even in this case conveyancers do not feel that confidence on which they can implicitly rely. Some contend that the trustee has the equitable freehold; while others maintain the opinion that the person who has the beneficial interest is solely the equitable owner, and that this person alone may make a good tenant to the writ of entry, for suf-[28]
fering a common recovery. This seems to be the better opinion, for the supposed trustee has no estate at law, and it should seem that even in equity he has no more than an *office*, and not any *interest*, which can render his concurrence in a common assurance, like a recovery in any wise necessary.

The cases in the note (p. 22.) will also

show, that in some cases an attempt has been made to invalidate equitable recoveries, on the ground of an adverse possession, corresponding in effect with a disseisin of a legal estate. The cases on this point should be considered from the reports of the cases themselves.

It is also observable, that a recovery suffered by a person who has the legal estate in fee, subject to an equitable intail in himself, may bar (*k*) this equitable estate-tail, and all ulterior interests.

And, once for all, it may be observed, that there is not any occasion on which it is more important that a full abstract of the title should be laid before the conveyancer for his advice, than when preparing a recovery deed. It has happened more than once, that six recoveries have been suffered to bar the same estate-tail, and that five of them have been defective, for want of a good tenant to the writ of entry; and the sixth recovery, though good according to the better opinion, involved the question, whether a recovery defective, as against the issue in tail, and those in remainder and reversion, for want of a good tenant to the writ of entry, is good as between the parties, so as to pass the estate by way of estoppel or conveyance, and supply a seisin to serve the uses declared thereof.

(*k*) *Marwood* v. *Turner*, 3 P. W. 163.

ON THE PARTIES TO A RECOVERY.

THE PARTIES TO A RECOVERY ARE

I. *The Demandant.*

II. *The Tenant.*

III. *The Vouchees.*

I. *Of the Demandant.*

THE demandant is merely a formal party, for the purpose of supporting the character of plaintiff in the action on which the recovery is founded. It is of little consequence who is named demandant. Generally only one person is named. Sometimes two persons are named. Respecting the demandant, it is merely necessary that he should be alive when judgment is given on the recovery. In case he dies pending the proceeding, another demandant must be named, and the proceeding commenced *de novo;* but if the recovery deed be actually prepared and executed, there will not be any

[30]occasion for another recovery deed. A precedent of a deed prepared on occasion of the death of a demandant will be found in the *Appendix*, p. 466. The deed was in that case prepared to meet the wishes of the parties, rather than from any conviction that it was necessary.

II. *Of the Tenant.*

The tenant is the person in whom the freehold resides, and against whom the lands are to be demanded by the plaintiff, in real actions called the demandant. By the freehold must be understood the immediate freehold (*a*).

For convenience, some gentleman residing near to, and personally attending the court in which the recovery is to be suffered, should be named the tenant. This practice will save the expense of a dedimus to take his warrant of attorney, an expense which otherwise will be necessary (*b*). Sometimes two persons are named tenants. This is done to guard against the death of one tenant before the recovery is suffered. This caution can rarely be necessary in the common and ordinary practice of suffering the recovery in the first instance, and executing

(*a*) Essay on Est. chap. Freehold.

(*b*) Pig. on Recoveries, 26.

the deed, making a tenant to the recovery at a subsequent period. When two persons are named tenants, and both are alive at [31] the time when the recovery is suffered, both these persons must be named as tenants in the proceedings for suffering the recovery. Should only one of these persons (as has sometimes happened) be named, the recovery will be defective for the moiety or other share of the person not named in the proceedings: for, as to his share, the recovery will be suffered without a good tenant to the writ of entry. So, when two persons are joint-tenants, and the recovery is suffered on a writ brought against one of them, the recovery will be defective for a moiety (*c*).

It is not absolutely necessary that there should be a *conveyance*, for the purpose of making a tenant to the writ of entry. The writ may be brought against the person in whom the freehold is vested. A recovery suffered in this mode will be good, so far as the existence of a good tenant to the writ of entry is material. In some cases, it has been advised that the writ should be brought against the tenant: thus, where lands were given to one in tail, with a conditional limitation over in the event of his alienation,

(*c*) *Marquis of Winchester's* Case, 3 Co. 1.

[32] Mr. *Fearne* (*d*) recommended that he should be named as tenant in the recovery ; in other words, that the writ of entry should be brought against him, that the recovery itself might be the alienation, and bar the conditional limitation before it operated.

When the lands lie in different jurisdictions, as in England and Wales, or within the jurisdiction of the courts of Westminster-Hall, and one of the counties Palatine, there may be one recovery deed ; but it will be found convenient that the lands in each distinct jurisdiction should be conveyed to a distinct person as tenant.

In bargains and sales made under these circumstances, there should be different grants to the different persons to be tenants in the different recoveries.

In conveyances which admit of a declaration of use, the conveyance may be made to one person, to the use, as to the lands, &c. in one jurisdiction, of the intended tenant in the recovery to be suffered in this jurisdiction ; and as to the lands in the other jurisdiction, to the use of the intended tenant in the recovery to be suffered in that jurisdiction.

For example, the conveyance may be made of all the lands to A. and his heirs, " to the uses hereinafter declared of and

(*d*) Post. Works, 335.

" concerning the said lands respectively, " (that is to say)

" As to, for, and concerning all those, &c. " situate in the county Palatine of Lancas- " ter," [or " in the county of in Wales,"[33] or " in Ireland," &c. *mutatis muntandis* according to the circumstances,]" to " the use of and his heirs, to " the intent," &c. (here detailing the intent of suffering the recovery), " and as to, for, " and concerning all those," &c. [if particular lands; or " all other," &c. if the residue,] " to the use of and his " heirs, to the intent," &c.

Even in cases of this description, one declaratory clause of the intent of suffering the recovery will suffice: so as a special clause, or declaration, shall be added, which will be to this effect, viz. " that the several " limitations hereinbefore made to the use " of and respectively, " and their respective heirs are made to " them respectively, to the intent that they " respectively may be tenants of the free- " hold of the lands, &c. conveyed to them " respectively, and that each of them shall, " as to the lands limited to his use, &c. " permit and suffer the said (the de- " mandant) to sue forth and prosecute," &c. See Index to the Precedents, vol. " Recovery."

[34] *By what Means the Tenant to the Writ of Entry is made.*

The conveyance for making a tenant to the writ of entry may be by fine, by feoffment, by lease and release, by bargain and sale ; or in short, any species of conveyance, proper to pass the immediate freehold.

Formerly it was the practice in all cases of recoveries, in which the lands were the inheritance of a married woman, to have a fine from her and her husband, on the supposition that her freehold and inheritance could not be conveyed so as to make a tenant to the writ of entry, without a fine.

The practice is now altered in this particular. From several cases (*e*) it is clear, that the husband has the freehold in right of his wife, and that he alone may make a good tenant of the freehold by his conveyance. To this practice there is one exception, peculiarly applicable to equitable recoveries.

For in equitable recoveries, when the wife has the freehold, by way of *separate estate*, the husband has no seisin in her right, and

(*e*) 2 Roll's Abr. 394, pl. 4. T. Talb. 114. 1 Atk. 473. *Robinson* v. *Cumming*, Case

the wife alone is competent to make a good tenant of the freehold.

On this point also the practice has varied: formerly it was the prevailing opinion, that [35] the wife could not convey her equitable freehold, without a fine levied by her and her husband (*f*): but in Burnaby and Griffin (*g*) Lord *Loughborough*, Chancellor, denied the necessity of a fine. The ground of his opinion was, that a feme-covert, who has the equitable freehold of lands, by way of separate estate, may alien that estate, and, consequently, transfer her equitable freehold to the tenant. The determination in this case is said not to have been satisfactory to the gentlemen of the Chancery-bar; and subsequent to that determination, two eminent conveyancers, in considering a case before them, thought a purchaser entitled to expect another recovery, although a recovery had been suffered, in which the wife alone made the tenant to the writ of entry. At the same time, the private opinion of one of these gentlemen was, that the determination was right: and, upon principle, it would be very difficult to impeach that determination; for, as the husband has no estate or interest in right of his wife, when there is a trust for her separate use,

(*f*) Fearne's Post. Works, 330. (*g*) 3 Ves. jun. 266.

there is an absurdity, and an inconvenience,
[36]in requiring his concurrence; and as the wife has a *separate* estate, she is by the acknowledged rules of a court of equity, to be considered as a feme-sole, as far as she is made a feme-sole by the trusts declared in her favour. It is also observable, that as she cannot levy a fine without the concurrence of her husband, to require a fine from her is to give the husband a controul over the property; while it was intended, and is the nature of the trust, to give to the wife the power of enjoying, or aliening this property, without his interference or concurrence.

When the tenant to the writ of entry is made by *fine*, it is sufficient that the fine is levied, as of the same term (*h*) in which the recovery is suffered. A fine levied by tenant in tail in a *prior* term, without any declaration of the use, will, by construction, be deemed a fine levied to the conusee for his own use, so as to keep the freehold in him, to make him tenant, even notwithstanding a long interval has elapsed, and there was, at the time of levying the fine, no declared intention of suffering a common recovery (*i*).

The subsequent transaction rebuts the

(*h*) *Phetyplace* v. ———, 3 Keb. 597. Gilb. Eq. Cases 16. 2 Salk. 676.

(*i*) *Altham* v. *Anglesey*, Pigot on Rec. 52.

presumption of a resulting use in favour of [37] the conusor.

Also a recovery will be good, when the tenant to the writ of entry is made by fine, notwithstanding the fine shall, after the recovery has been suffered, be reversed for error (*k*)

The fine remains in force till avoided, and the conusee has the freehold, till that freehold is, by avoiding the operation of the fine, defeated; so that the freehold continues in the conusee till the writ of entry is brought, and this is all the law requires: for as a *general rule*, at common law, it was sufficient, that there was a good tenant to the writ of entry at any time before judgment (*l*); namely, before the return of the writ of entry, or of the *summoneas ad warrantizandum*, on which the recovery is grounded, and to which it relates (*m*).

In this particular there is a difference between a tenancy to a writ of entry, made by a fine voidable for error, and by a bargain and sale, which becomes void for want of enrolment in due time, as will be observed in the further consideration of this subject.

There is also a difference between a tenancy to a writ of entry made by fine, and by

(*k*) *Lloyd* v. *Evelyn*, 2 Salk. 508.

(*l*) *Lacy* v. *Williams*, 2 Salk. 568. Pigot, 30.

(*m*) Pig. 29, 30.

feoffment. A fine is an acknowledgment of a feoffment on record (*n*): but unless the co-
[38] nusor in the fine has the freehold, the freehold will not pass (*o*). A feoffment will, from its peculiar properties, gain a freehold, and make a good tenant to the writ of entry (*p*).

The tenant to the writ of entry is frequently made by *bargain and sale* inrolled; and the recovery grounded on the bargain and sale will be good, notwithstanding the inrolment takes place subsequent to the term in which the recovery is suffered (*q*). On account of the peculiar properties of a bargain and sale, the recovery will be void, or rather voidable, unless the bargain and sale shall be inrolled in due time, namely, within six lunar months (*r*). For though it is now agreed that the bargain and sale operates *instanter* on the freehold, yet this operation is subject to an implied condition, that the grant shall be deemed void *ab initio*, unless the inrolment shall take place within the limited time. This point is an anomaly in law; and is the result of the

(*n*) 2 Black. Com. 348.

(*o*) *Dormer* v. *Parkhurst*, 3 Atk. 135.

(*p*) Pigot, 40. Litt. sec. 611. Co. Litt. 330. b.

Taylor ex. dem. Atkyns v. *Horde*, 1 Burr. 60. 5 Bro. Par. Cas. 247 is to the contrary.

(*q*) *Hynde's* case, 4 Co. 71. Pig. 56.

(*r*) *Mallery* v. *Jennings*, 2 Inst. 674. Shep. Touch. 226.

Lellingham v. *Alsop*, 2 Inst. 675.

provisions of the statute of inrolment, and not of the rules of the common law. By the rules of the common law, provided there was a seisin at the time when the writ of entry was sued, that seisin would have supported the recovery, although the seisin was defeated, after judgment given, by a condition (*s*), or evicted by an elder title. It is said after judgment, for a recovery in formedon against the tenant, pending the writ, abated the writ (*t*).

The observations which have been offered suppose it to be essential, that the instrument, which is in the form of a bargain and sale, should operate in that mode. Should circumstances allow of the operation of the instrument in a different mode; for [39] example, as a *grant*, so as to pass the freehold; or as a *surrender*, so that the immediate freehold may be in the person named as tenant: resort may be had to that construction, to support the operation of the deed, and, through its medium, the validity of the recovery. In all cases of this sort, with the exception of the case of a bargain and sale inrolled, it is sufficient that the freehold was in the tenant at the time when the recovery was suffered; or *appears* to have been in him during that term (*u*): and the

(*s*) 1 Keb. 785.
(*t*) 1 Ld. Raym. 476.
(*u*) 14 Geo. 2. c. 20.

point to be regarded is, whether the deed under consideration, had by any, and what mode of operation, the effect of giving the tenant the seisin of the *immediate* freehold.

When a recovery is to be suffered of lands of *considerable value*, or of lands intended to be sold in *parcels*, it is prudent to have the tenant to the writ of entry made by bargain and sale ; or at least by some deed inrolled: so that future purchasers may, by referring to the inrolment, and, if necessary, taking an office copy, have complete evidence of the recovery deed ; and that the owner may not, on a sale in parcels, be bound to give copies of the recovery-deed to the purchasers (*v*). A fine is sometimes levied with this view.

[40] It is agreed that bargains and sales merely give an use, executed into estate by the statute for transferring uses into possession (*w*). On this account no use can be declared of the seisin of the bargainee. Such ulterior use is an use upon an use (*x*).

These observations are inapplicable to uses declared in a bargain and sale, of a recovery suffered, or to be suffered. In that case the uses are to arise from the seisin of the recoveror, and not from the seisin of the

(*v*) See infra, chap. on Bargains and Sales.

(*w*) 27 H. VIII. c. 10.

(*x*) *Tyrrel's* case, Dyer, 155, a.

bargainee (*y*). The rule that a use cannot arise on the seisin of a bargainee, is confined to bargains and sales, to operate through the medium of the statute for transferring uses into possession. (*z*)

Bargains and sales, which pass a common law seisin, do not fall within the scope of this rule. This point will be more fully illustrated in the chapter on bargains and sales.

When the tenant to the writ of entry is made by any other means than a fine, or by bargain and sale inrolled, it is necessary only to take care that the conveyance is sufficient, in point of law, to transfer the *immediate freehold* to the intended tenant.

In the instance of a feoffment there must [41] be livery of seisin. In case of a grant, there must be a remainder, reversion, or an incorporeal hereditament. And in the instance of a release in enlargement of an estate, there must be an estate capable of enlargement. These estates must be conveyed, at least *appear* to be conveyed, so as to vest the freehold in the person named as tenant, during the term in which judgment is given, in the recovery (*a*).

In all the instances which have been stated, when the deed cannot operate in the

(*y*) *Webb v. Nect*, Cro. Eliz.

(*z*) 27 H. VIII. c. 10.

(*a*) 14 Geo. 2, c. 20.

precise mode in which it was intended to have effect, it is to be considered whether it cannot operate with effect in some other mode. The general rule is, "that the "construction be such, that the whole deed "and every part of it may take effect, and "as much effect as may be to that purpose "for which it was made: so as when the "deed cannot take effect according to the "letter, it be construed so as it may take "some effect or other (*b*);" and this rule is highly favoured, and receives a very liberal interpretation and extensive application (*c*).

In many instances, a title, deemed defective for want of due inrolment, might be, and in point of practice may be supported; by considering whether the deed though invalid as a bargain and sale inrolled, may not operate as a grant, and pass the freehold in that mode.

At the common law there were only four species of assurance; a feoffment, a grant, a lease, and a release in enlargement of an estate previously granted.

Unless the owner had the possession, he had not any right to make livery of seisin; nor could he make livery of seisin with effect, unless the tenant in possession, consented to give up the possession, at least

(*b*) Shep. Touch. 84.
(*c*) *Roe* v. *Tranmer*, Willes's Rep. 682. 2 Wils. 75.

pro hac vice, or assented to the livery. All reversions and remainders expectant on any particular estate, even on an estate at will, or a tenancy by copyhold ; and also all incorporeal hereditaments were alienable to a stranger by means of a *grant* by deed : and this grant was inchoate only, till the tenant had attorned, or in other words, consented to the grant. The statute of 4 and 5 Ann. c. 16. for the amendment of the law, superseded the necessity of attornment ; so that now, notwithstanding the doctrine adverted to by Mr. *Fearne*, (*d*) to the contrary, a grant by a person having an incorporeal hereditament, or having a reversion or remainder expectant on any particular estate, (and for the purpose of these observations, it is necessary only to notice a term for years, or at will,) will immediately, and by its own operation, pass the freehold to the grantee.

Who shall be a sufficient Tenant to a Writ of Entry, in Point of Estate. [42]

The law has carefully distinguished between those estates which are, and those which are not of a freehold quality. It is of general utility, and of the first importance, with a view to the validity of reco-

(*d*) Fearne's Posth. 28.

veries, to acquire a correct knowledge of the nature, gradation, and extent of estates; and the author cannot, in his own opinion, render a more acceptable service to those, for whose use these observations are intended, than by taking a comprehensive view of this subject, and offering such practical deductions as arise out of the same. He will therefore fully discuss this learning, in the chapter on *surrenders;* or on *merger*, as connected with that head of the law. At present it will be sufficient to observe, that estates are divided into, estates, 1st of *freehold*, and 2d, not of *freehold*. Estates of freehold are again divided into estates which are of *inheritance*, and estates which are *not of inheritance* (*e*).

Estates which are not of freehold are merely *chattel interests*. Of this descrip-
[43]tion are, 1st, terms of years; 2d, interests by statute merchant, statute staple, and elegit; and 3d, other uncertain interests as a devise to executors till debts are paid (*f*).

By these chattel interests, no right to the freehold is conferred; and for this reason, when the person against whom the writ of entry is brought, has merely a term for years, or any other interest less than the freehold,

(*e*) Essay on Estates, 114. Chap. on Chattel Interests.
(*f*) Essay on Estates, 603.

the recovery will be defective. An estate to a man for 99, or any other number of years, *if he shall so long live*, is a mere chattel interest. The owner of such an interest cannot either be, or make a good tenant to the writ of entry (*g*).

In one instance, by the rule of the common law, a termor for years might by the mere act of law, without descent, have become the freeholder. This hapened by *occupancy*, when the law cast the freehold on the occupier (*h*).—That case is an anomaly. The occupier was the tenant of the freehold by reason of the occupancy (*i*). Though his possession, under the term, was the cause of his occupancy, the term was, in the conclusion, that he had the freehold totally disregarded. Had a stranger been found the [44] occupier, he would have had the freehold as occupant.

By the statute law (*k*), the *executors* and *administrators* are substituted in the place of the general occupant: and Mr. *Hargrave* (*l*) observes, "the title by general occupancy is now universally prevented by the stat. of 29 Car. II. c. 3. sect. 12; and 14 Geo. II. c. 20. sect. 9."

(*g*) *Smith ex dem. Dormer* v. *Parkhurst*, 3 Atk. 135.

(*h*) Hale's Notes to Co. Litt. 41, b. Pig. on Recov. 35. *Harris* v. *Fielding*, 1 Keb. 785.

(*i*) Hale's Notes to Co. Litt. 41, b.

(*k*) 29 Car. 2, c. 3, sec. 12. 14 Geo. 2, c. 20. s. 9.

(*l*) Harg. Co. Litt. 41, b. note 5.

The statutes however have not substituted an occupant in those instances in which by law there could not be a general occupant, as in copyholds, and in rents, and other incorporeal hereditaments (*m*). And it was strenuously urged by Lord *Redesdale*, while chancellor in *Ireland* (*n*) that the executors or administrators never could, by law, have been *special* occupants. In *Ripley* v. *Waterworth* (*o*), Lord *Eldon* did not fully subscribe to this doctrine.

And there is one case in which, perhaps, there may for a time, even at this day, be a freehold by *general occupancy*, namely, in the interval between the death of a tenant *pour autre vie*, who dies intestate, and the time of obtaining letters of administration of his effects. Without allowing a title by occupancy to exist, for the intermediate time, the maxim of the law, which so carefully guards against the *abeyance* of the freehold, would be infringed. Unless the law leaves the freehold open to occupancy during the intermediate time, it must be assumed that the statute of 14 Geo. II. requires the construction, that it gives to the administrator a title by relation; and this construction must proceed on the ground

(*m*) *Withers* v. *Withers*, Ambl. 151.
Zouch v. *Forse*, 7 East. 186.
2 Bl. Com. 260. and see 3 East. 276.
(*n*) 1 Sch. and Lef. 288.
(*o*) 7 Ves. J. 425, 440.

that no inconvenience will be produced, as administration can be obtained by a stranger, in case the party who is entitled to adminis-[45] tration shall, on being cited, refuse to take letters of administration.

Thus the freehold of the church will be in abeyance, till a successor to the parson shall be appointed (*p*); and on the death of the tenant *pour autre vie*, leaving the possession vacant, the freehold will be in abeyance till some one enters (*q*). The former hypothesis is most consonant with our system of tenures. Thus in the case of the birth of a posthumous child, the heir for the time being is allowed to take (*r*): and the statute of Will. III. (*s*) applies *only* to posthumous children, who are to take by purchase, on the death of their parent; and consequently are *in esse* to many purposes (*t*).

All estates of inheritance are estates of freehold. Estates of freehold, however, are not necessarily estates of inheritance.

Under the division of estates of freehold, may be classed,

First, The estate of tenant for his own life.

(*p*) Co. Litt. 342, b.
(*q*) Ibid.
(*r*) *Shelley's* case, 1 Co. 93, b. Watkins' Descent, ch. 4. *Bassett* v. *Bassett*, 3 Atk. 207.
(*s*) 10 & 11 Will. III. c. 16.
(*t*) *Doe* v. *Clarke*, 2 H. Black. 401. *Millar* v. *Turner*, 1 Vess. 87.

Secondly, For the life of another person, or *pour autre vie*.

Thirdly, For the joint lives of several persons.

[46] *Fourthly*, For a period which is circumscribed by, and may determine during a life or lives, as,—

1st, During widowhood.

2d, During chastity.

3d, While sole.

4th, Till the return of A. from Rome, and the like ; of which a great variety of examples, with the circumstances distinguishing estates of uncertain duration, which are of freehold, from those which are of inheritance, will be found in the essay on estates (*u*). Some of these estates of mere freehold may be transmissible to *heirs*, or heirs of the body; still, however, they are merely estates of freehold and not of inheritance. The *heirs* are to take by special occupancy or designation, not by descent (*v*).

Estates of inheritance are,

1st, Estates in fee simple.

2d, Qualified fees.

3d, Determinable fees.

4th, Fees subject to conditions.

(*u*) Chap. Estates for Life.

(*v*) *Low* v. *Burron*, 3 P. W. 262.

Grey v. *Manock*, stated 6 Term Rep. 292.

Doe d. *Blake* v. *Luxton*, 6 Term Rep. 289.

Ripley v. *Waterworth*, 7 Ves. jun. 425.

5th, Fees conditional, and

6th, Estates-tail, in all their varieties (*w*).

And whatever is the nature or extent of [47] the freehold, vested in the tenant, whether it is of the superior or inferior denomination, is of no material importance to the validity of the recovery. All that is regarded is, that the tenant should have *the freehold:* no attention is paid to the circumstance, that the estate is absolute or conditional, indefinite or determinable. It will be sufficient, even though it should continue in the tenant only for an instant; as in case of a grant made *within the term* to A. and his heirs, *till he shall be tenant of the freehold.* Though the freehold commences, and, as it should seem, determines in the same instant, under this grant, the rule of law, which requires the tenant to have the freehold before judgment is given, will be satisfied.

Who shall be said to have the Freehold. [48]

The law does not merely and simply require that the tenant should have *an estate of freehold.*—Any estate of freehold or inheritance would answer that description. He must have that estate which confers the interest, emphatically denominated *the freehold:* in other words, the immediate

(*w*) Essay on Estates, Chap. Fee.

freehold ; namely, the first of all the estates of freehold. For example, when A. is tenant for life, remainder to B. for life, in tail, or in fee, B. has *an estate of freehold*, but A. has the *immediate freehold ;* and it is he, or the person claiming under his conveyance, who must (to bar the estate-tail, &c.) be named tenant in the proceedings (*x*) : unless indeed an end be put to his interest, by the *surrender* or *merger* of his estate ; so as to accelerate the remainder or reversion, and thus confer on the owner of the remainder or reversion the title to the immediate freehold. And it is immaterial whether the tenant has the freehold *in fact*, or the freehold *in law* only, as an heir before entry (*y*).

Another conclusion to be drawn from these observations is, that the tenant must have the *estate* of freehold. A mere *contingent executory interest is not any estate :* such interest will not answer the description of an *estate* of freehold (*z*).

[49] Whoever wishes to understand this subject in a scientific manner must study the learning of real actions. As an introduction to this interesting subject, the chapter on Freeholds in the Essay on Estates, will, it is hoped, be found of some use.

(*x*) Pigot, 37.
Smith ex. dem. Dormer v. *Parkhurst*, 3 Atk. 135.

(*y*) See *Piggot* v. *Waller*, 7 Ves. J. 98.

(*z*) See Tracts on Cross Remainders, Index. vo. *Executory.*

Who, in Point of Estate, &c. *can make a suf-*[50]
ficient Tenant to the Writ of Entry; and to what extent in POINT OF SHARE.

Any person in whom the freehold is vested, may convey it by a formal and efficient instrument, unless incapacitated by infancy, coverture, idiocy, or lunacy.

The freehold in all cases belongs either to one person *solely;* or to several persons *jointly;* or to several persons in common or *severalty;* or to two persons as tenants by *intireties* (*a*). Thus there will be either a sole tenant of the freehold, joint-tenants, tenants in common, or tenants by entireties.

Again, persons are to be considered as having the freehold either in their own right, or in right of some other person.

When a person is *solely* seised, he alone may be, or may make, a tenant to the freehold of the intirety.

When several persons are seised of the freehold as *joint tenants,* or *tenants in common,* neither of them can, by a conveyance, make a tenant of the freehold for more than his aliquot part. Nor can a tenant in common

(*a*) Essay on Estates, introductory Chap. p. 46. *Greneley's* case, 8 Co. 71, b. *Beaumont's* case, 9 Co. 138, b.

[51] be considered as a good tenant for more than his particular share. A joint-tenant cannot convey more than his aliquot part. If the writ is brought *against him* as *sole tenant*, and he takes the defence on himself, there will be a good tenant to the writ of entry for his part only. Notwithstanding joint-tenants are seised *per my & per tout*, and joint-tenancy is only a plea in abatement (*b*); yet the want of the freehold for the remaining parts will, as to those parts, affect the validity of the recovery. The *Marquis of Winchester's case* (*c*) was decided on this ground.

Sole tenancy is also a plea in abatement. But if the writ be brought against several, when one of them alone has the freehold, the recovery will be good (*d*).

Tenancy by *intireties* is peculiar to husband and wife, and arises from the legal notion of the unity of their persons (*e*).

In all cases of several tenants, it is essential that each of these persons should be, or should convey to, the person named as tenant in the writ of entry, in order that the recovery may be good for his share.

[52] As to joint-tenancy, and tenancy in common, under limitations in conveyances to

(*b*) Booth's Real Actions, 31.
(*c*) 3 Co. 1, and supra, p. 31.
(*d*) *Eare* v. *Snow*, Plow. 451.
(*e*) Litt. s. 291. Essay on Est. 46.

uses (*f*), and in wills (*g*), the freehold may vest in one person, or two or more persons, subject to a right of other persons who may come *in esse*, or answer a given description, as "all my children who shall attain 21 years of age," to take jointly, or in common with them; so that the freehold may shift. In a case of this sort, it should seem sufficient, that the person who, *for the time being* may be entitled to the freehold, should be named tenant in the writ of entry, or should join in a conveyance to him; since the person named as tenant in the writ of entry will have the freehold at the time.

But if these persons have an estate-tail, and they suffer a common recovery in which they are vouched and vouch over, this recovery, it is apprehended, will, as to the estate-tail or the remainders over, be binding for those shares only, which shall eventually be their proportion, when the quantum of shares shall be ascertained, by a division between all the persons who now are or ultimately shall become entitled.

To illustrate these observations: suppose [53]
a devise to be made to all the children of

(*f*) *Matthews* v. *Temple*, or *Sussex* v. *Temple*, Comb. 467.
1 Lord Raym. 311.
Mutton's case, Dyer, 274, b.
Brent's case, Dyer, 339, b.

(*g*) *Oates* v. *Jackson*, 2 Str. 1172.
Doe v. *Perryn*, 3 Term Rep. 484.
Goodwyn v. *Goodwyn*, 1 Ves. 226.

A. in tail, and there is only one child, and he suffers a common recovery. Afterwards two children are born. This recovery will, in the first place, be good for the intirety; when another child shall be born, it will, at least as to that child, be defeated for a moiety; and upon the birth of the third child it will be defeated so as to confine the operation of the recovery to one third part.

On this point there is not any decision. For that reason, it may be questioned, whether the recovery, though avoided in favour of the subsequent born children, would also, as to the shares of the subsequent born children, be avoided against those in remainder or reversion. The better opinion, it should seem, is, and so the practice is conceded to be, that the recovery will as to these shares be avoided as against those in remainder or reversion; for by relation, and in the event which happened, the child by whom the recovery was suffered, was tenant in tail, only of one third part of the lands. These springing interests are not merely collateral. The lands and the estate of the person who has acquired a vested interest, are subject to, or charged with, these springing interests, as concurrent rights.

The present case must not be confounded with cases, in which children, or other

persons, are, under like circumstances, to have estates-tail, with cross remainders between them in tail; for when there are cross [54] remainders, the person suffering the recovery has a share in every part of the intirety, and the recovery may be good under the cross remainders, in respect of those remainders. As to the shares in which there were remainders only, the estate-tail will be changed into an estate in fee, subject only to the prior estate-tail, as it arises and vests in other persons, and also subject to be defeated by the conversion and enlargement of the estate-tail into a fee-simple. Though the birth of other children would remove the estate, in their shares, to a greater distance from the right of present possession, yet a recovery duly suffered by the only child for the time being, will continue to be a bar to the remainders and reversions subsequent to the estate of that child in each respective share.

Sometimes it happens that one person is the heir in tail for a time, and the title of such heir is wholly or partially excluded, by the birth of a more immediate heir: as in the instance of a gift to A. in tail, who dies leaving a daughter his heir, and his wife *enseint;* and the wife is afterwards delivered of a son, who becomes *solely* heir; or of a daughter, who becomes a *coheir*. In

these, and the like instances, if any can arise, a recovery, suffered by the heir *pro tempore*, would, it is apprehended, be avoided, by mere conclusion of law, by the birth of a more *immediate* heir. At least the recovery would be so far avoided, that it would not bar the issue in tail, of any other person than the person who suffered the recovery, nor the reversioners or remaindermen, nor even the issue in tail of the person by whom the recovery may be suffered: and yet as against the person himself suffering the recovery, it would be good by way of estoppel.

Sometimes husband and wife have the freehold by moieties; sometimes jointly, as joint-tenants; sometimes by intireties; and sometimes the husband and wife are seised in right of the wife.

When the husband and wife have the freehold as tenants in common, then the husband is solely seised in his own right, of his own moiety; and he and his wife are seised, in right of the wife, of the other moiety: and he as seised in right of his wife, may pass the freehold of the moiety which belonged to her; and may, by reason of the seisin in his own right, convey the freehold of the other moiety.

And when the husband and wife are joint-tenants, or tenants by intireties, of the free-

hold, the conveyance of the husband alone will pass the freehold: and consequently he alone may make a good tenant to the writ of entry (*h*). [55]

When the husband and wife have the seisin merely in right of the wife, it is universally true that the husband alone may convey the freehold (*i*).

In Pigott, 38, (citing 2 Inst. 342, which, however, is not material to this purpose,) it is said, "lands are given to husband and "wife, and the heirs of the body of the hus- "band, remainder over; the husband alone "suffers a recovery, wherein he is tenant "to the præcipe, and vouches the com- "mon vouchee: this is no bar to the issue, "or him in remainder; for the recom- "pense cannot enure to the estate,—the "wife having a joint-estate with her hus- "band, she cannot be a partaker of the re- "compense, because she was no party to "the recovery: for the estate between hus- "band and wife is an entire estate, and no "moiety between them; so the husband "alone no good tenant to the præcipe."

This case was rightly decided. The reason, however, to which it is ascribed is not

(*h*) *Robinson* v. *Comyns*, Cas. T. Talb. 164. 1 Atk. 473.
Cuppledike's case, 3 Co. 6. Pig. Recov. 72. Butler's Co. Litt. 325. b, n. 2. Gilb. Tenures, 108.

(*i*) *Robinson* v. *Comyn's* cas. T. Talb. 164. 2 Rol. Abr. 394, l. 10. Pig. Rec. 72.

[56] correct. The husband was a good tenant to the writ ; but the objection was, and so it appears in *Pigott*, that his estate-tail was so circumstanced, that it was not barred by a recovery, naming him as tenant. He ought to have conveyed the freehold to the person named as tenant, and to have been vouched ; and even Pigott admits, that in this instance the recovery would have been good, had the writ of entry been brought against the husband and wife. (*k*).

In support of the opinion that the estate-tail would have been barred by a recovery, duly suffered upon a voucher of the husband, and a voucher over by him, Mr. *Pigott* himself may be quoted as an authority. In page 67, he puts this case : " if lands " are given to husband and wife, and the " heirs of the body of the husband remain- " der to a stranger, and the husband, discon- " tinues by fine or feoffment, or grants the " lands by lease and release, or deed of bar- " gain and sale inrolled, and a writ of en- " try is brought against conusee, feofee, or " grantee, and he vouches the husband " alone, who vouches the common vouchee : " this common recovery is good, and bars " the estate-tail and all remainders, but not " the wife's estate."

(*k*) Pigott on Recoveries, 70. *Owen and Morgan's* Ca. 3. Co. 5.

To all these cases one general observation may be applied. In each instance the recovery was defective, on the ground that it was suffered by the *husband as tenant*, and not a vouchee. A recovery suffered by him as vouchee would have been free from [57] objection, provided the writ of entry had been prosecuted against some person in whom the freehold had been vested, by means of a conveyance *made by him*. For example, in *Cuppledike's* case (*l*), husband and wife were seised to them and the heirs male of the body of the husband, with remainder over; and the husband discontinued, and the writ of entry was brought against the discontinuee; and the husband was vouched, and he vouched over. This recovery was held a good bar to the remote estate-tail of the husband, and the remainders, &c. expectant on the estate. The language of the judgment, as reported by Lord *Coke*, is, "This recovery shall bind the re- "mainder; for here was a lawful tenant to "the *præcipe*, and although Francis (the "husband), who had the estate-tail, be only "vouched, and not Elizabeth (the wife), "who had a joint estate with him, yet "Francis coming in as *vouchee*, he comes in, "in privity of the estate-tail, and not of "any other estate; and the recoveror in

(*l*) 3 Co. 6.

" value gave recompense to the tail which
" Francis had, and to the remainders over."

[58] Another distinction to be collected from the case in *Pigott*, p. 38, is, that when the husband and wife are seised to them as tenants by intireties, and to the heirs of the body of the husband, so that there is a joint freehold in the husband and wife, and the inheritance in the husband solely; this estate-tail is to be barred either by a recovery suffered by the husband and wife, *jointly as tenants*, or by the husband alone as *vouchee;* so that, though the husband alone may *make*, he alone cannot, under these circumstances, and with a view to bar his estate-tail, *be*, a good tenant to the writ of entry. Such is the conclusion, and a strange one it is, from *Owen and Morgan's case* (*m*). The point will be more minutely examined in considering the doctrine of Voucher.

In practice, a question frequently arises, whether a *mere trustee* may, either alone, or with the consent of the *cestui que trust*, lend his assistance towards suffering a recovery. This question is more important when there is a declared trust for supporting contingent remainders.—It is agreed, the recovery will be good at law, and though equity will

(*m*) 3 Co. 5, a 3 Co. 6, b. View of the Rule in Shelley's case, 87.

not compel the trustee to join in the proceedings for suffering a recovery, the better opinion seems to be, they will not charge him with a breach of trust for giving his concurrence.

Trustees, however, are very cautious how [59] they join in any acts which may affect the interest of third persons; and purchasers under titles so circumstanced feel considerable difficulty in being satisfied of their security. This point was examined, and fully discussed, in the case of *Moody* v. *Walters* (*n*); and though the decision supported the recovery, the arguments adduced as props to sustain the title, show that the general question is attended with as much difficulty as there was prior to that decision.

Other points peculiar to equitable recoveries have been noticed under the division in which they are considered.

It remains only to be observed under this head, that a *termor for years*, or other person having a chattel interest, cannot be a good tenant to a writ of entry. That there may be a good tenant to a writ of entry by his means, he must make a feoffment, and gain the freehold by *disseisin*; the better opinion is that the feoffment of a tenant for years will gain the freehold.

(*n*) 16 Ves. jun. 283.

Indeed no doubt could have been reasonably entertained on this point, if the court of King's Bench, and afterwards the House of Lords, had not decided the contrary in *Taylor* v. *Horde* (*o*).

Lord *Hardwicke* viewed the feoffment of a tenant for years, as acquiring the freehold (*p*); so does Mr. *Butler* in his excellent note to Co. Litt. 330, b: and it is hardly
[60] possible to conceive on what principle of tenure the decision of *Taylor* v. *Horde* can be supported. And on recent occasions the courts have allowed that Lord *Mansfield's* doctrine in that case cannot be sustained. To these observations it may be added that Mr. *Pigott* (*q*) admits, that though a tenant to the præcipe be absolutely necessary in every common recovery, yet if it be by *disseisin*, it is good in many cases. Lord *Mansfield* does not controvert this doctrine. The point on which he differs is, that a termor for years cannot by his feoffment gain the freehold by disseisin. Aware, however, that his argument rested on grounds which were disputable, he resorted to the common-law doctrine of fraud, and attacked the recovery in *Taylor* v. *Horde*, on that head.

(*o*) 1 Burr. 60. Cowper, 689. 5 Bro. P. Cas. 247.

(*p*) 3 Atk. 140. 3 Atk. 339.

(*q*) Pig. Rec. 40. And see *Lincoln College* case, 3 Co. 59.

At what Time the Tenant must have the Freehold. [61]

By the common law, it was necessary that the tenant should actually have been seised of the freehold during the pendency of the suit, and at some time before the recovery was suffered, in other words, judgment given; and consequently that livery of seisin, when such livery was necessary, should have been made, or the deeds have been executed, &c. before judgment given (*r*). Now by the statute law, it is sufficient that the deeds making the tenant to the *præcipe*, or writ of entry, *should appear to be dated* in the term in which the recovery is suffered, although they are executed *after judgment* given, or even writ of seisin awarded.

By the statute of 14 Geo. 2. c. 20. it is recited, "that it has frequently happened "that the deeds for making the tenants to "the writs of entry, or other writs for suf- "fering common recoveries, have been "lost, or that the fines or deeds, making "the tenants to the said writs, have not "been levied or executed till after the "judgment given in such recoveries, and [62] "the writ of seisin awarded, by reason "whereof great doubts have arisen whe- "ther such recoveries, for want of proper

(*r*) *Lacey* v. *Williams*, 2 Salk. 568. 1 Lord Raym. 227.

" tenants to the writs, are good and effec-
" tual in law."

And " to prevent such doubts for the " future, and to render common reco-
" veries more certain and effectual," among other things it is enacted (*s*), " that " from and after the commencement of this " act, every recovery *already* suffered, or " *hereafter* to be suffered, shall be deemed " good and valid to all intents and pur-
" poses, notwithstanding the fine, or deed " or deeds, making the tenant to such writ, " should be levied or executed after the " time of the judgment given in such reco-
" very, and the award of the writ of seisin " as aforesaid, provided the same *appear* to " be levied or executed before the end of " the term, great session, session, or " assizes, in which such recovery was " suffered, and the persons joining in such " recovery had a sufficient estate and power " to suffer the same as aforesaid."

To bring a case within the provisions of this act, care should be taken *to date* the recovery deeds on some day within the term. In legal intendment the deed is supposed to be executed on the day of the date.

The object of the act has by some professional gentlemen of distinguished emi-

(*s*) Sect. 6.

nence been supposed to have been, to make *the date or internal evidence of the deed itself* decisive of the validity of the recovery, without allowing any evidence to be given re- [63] specting the time of the execution: so that the recovery may be good, although the deeds are, in point of fact, *executed after the term;* provided they are dated within the term. This practice ought not to be adopted, unless from circumstances it should become indispensably necessary. In legal proceedings, the old maxim of *via trita, via tuta,* cannot be too implicitly observed.

To avoid all question on the construction of the act, the deed should be *executed* as well as dated, within the term.

This caution, originally suggested from principle, is now become necessary from experience. A gentleman, of the first eminence, has given an opinion that a title, depending on a recovery, cannot be safely accepted, unless the recovery deed be executed, at least before the end of the term, by those in whom the freehold resides. In his construction of the act, the words, "appear, "&c." mean *appear in evidence,* and do not refer to the *internal evidence* of the deeds themselves. There are, however, strong grounds for trying to establish, whenever circumstances shall require it, the construction given to the words of the statute, by those who

wish to make the internal evidence of the deed conclusive. This construction becomes more obvious, when the object of the statute, and the nature of the provisions collectively, are considered.

[64] For this was a remedial law, made with a *view* to supply defects, and for the security of titles depending on recoveries ; and is it not fair to argue that in using the word "*appear*," the legislature adverted to the internal evidence of the deed, since by that alone a purchaser is guided, and by that alone he can be protected from fraud ?

It must be admitted, however, that this construction is more difficult, on the recital than it is on the words of the enacting clause. On the recital, it may be insisted in argument, that the sole object of this legislative provision was to remedy the defect arising from a delay to execute the deeds, &c. till judgment given, or writ of seisin awarded ; and then with a qualification that the deeds should be *executed* within the term.

It is to be remembered that a fine acknowledged in the *vacation*, and levied as of the preceding term, will support a recovery suffered in that term (*t*).

Thus, by the common law, a recovery suffered defectively became good eventually, by reason of an assurance levied in point of

(*t*) *Lord Say and Sele's* case, 10 Mod. 43.

fact, after the end of the term: but the ground of this case is to be found in the leaving of estoppels and the nature of records. The record must be tried by its own internal evidence, and the courts will not admit it to be shown at what time the fine was acknowledged; and the result is, that the fine is considered, as it appears to be, as a fine levied in the same term in which the recovery was suffered.

In some cases it may be expedient to resort to a practice warranted by this rule of law, and to levy a fine in the vacation; and as of the preceding term, to supply a defect or omission to vest the freehold in the person named tenant in the recovery prior to, or before the end of the term in which the recovery may have been suffered.

Instances in which a Recovery will be good, although the actual Freehold of the particular Lands is not in the Person named as Tenant in the Writ of Entry. [65]

In general the person in whom the freehold of each parcel of the land resides, either in his own right, or by means of a conveyance made to him for the purpose, by the different owners, ought to be named tenant in the writ of entry.

To this general rule there are three exceptions.

First. At the common law, when lands, *parcel* of a *manor*, are granted for life, or in tail, the reversion remains *parcel of the manor* (*u*). In this case, a recovery suffered of the *manor*, will include the lands of which the reversion is in the lord: or rather, and more correctly speaking, the *reversion*: for the recovery being suffered of the manor, and the reversion being parcel of the manor, the reversion passes inclusively (*x*). Had the lands been severed from the manor, so that
[66] they did not remain parcel of the manor, the recovery would have been voidable, as to the reversion (*y*).

This instance owes its existence to the principles of tenure, and the nature of a manor. The reversion of the lands remains parcel of the manor; and the manor consequently includes this reversion: and whoever recovers the manor recovers a title to the reversion (*z*). So the person who recovers a manor, or to whom a manor is conveyed, gains a title, even to have lands which shall *escheat*: and the escheated lands will pass by a will made before the escheat

(*u*) Litt. s. 591.
Co. Litt. 324, b.
Pig. on Recoveries, 41.
Johnson v. *Earl of Derby*, Pig. Rec. 201.

(*x*) Pig. Recov. 41.
Jenk. Cent. 311.

(*y*) Co. Litt. 325, a.

(*z*) Pig. Recov. 45.

(*a*) : for lands when escheated come in lieu of the services, and are a consequence of seignory. But *freehold lands* held of a manor and *purchased* by the lord, do not become parcel of the manor (*b*). It is otherwise of lands of copyhold tenure, for they are not within the statute of *quia emptores* (*c*). Besides copyhold lands are parcel of the manor ; and the effect of a purchase by the lord, is to extinguish the *copyhold tenure :* while freehold lands are held of the lord of the manor ; and by a conveyance of the lands to him, the seignory is extinguished in the *land* or in the *tenancy*. When a manor is leased for life, excepting an acre, &c. the acre is not parcel of the manor during the continuance of the estate for life (*d*) ; consequently this acre will not pass, by a grant of the reversion of the manor. But if the reversion of the manor and the excepted acre continue in the same person till the estate for life be determined, the acre will again become parcel of the manor ; and may pass, inclusively, by a grant of the manor.

Secondly. The act of 14 Geo. II. c. 20. renders it unnecessary to procure a surrender from, or the concurrence of, persons whose

(*a*) Per Lord Mansfield in *Roe* v. *Griffiths*, 4 Burr. 1961.

(*b*) Jenk. Cent. 232. *Lemon* v. *Blackwall*, Skin. 192.

(*c*) 18 Ed. I.

(*d*) Co. Litt. 324, b. Pig. Recov. 46. 5 Co. 11, b. cites 38 H. 6, 33, b.

[67]estates depend on freehold leases, viz. *leases under rents thereby reserved.* After reciting that "several leases have been *heretofore*, "and are hereafter likely to be made, of "honors, castles, manors, lands, tenements, "and hereditaments, for one or more life "or lives, under particular rents thereby "reserved, and to be reserved, and that pro- "curing surrenders of such freehold leases, "or the tenants thereof to join, in order to "make tenants to the writs of entry or "other writs for suffering common recove- "ries, frequently occasions great trouble, "difficulty, and expense to tenants in tail, "and the same cannot, in many cases, be ob- "tained, by reason of the uncertainty in "whom the legal estate of freehold under "such leases are vested, and also by reason "of the disabilities and incapacities of such "lessees, or persons claiming under them, "by means whereof purchasers and family "settlements are often delayed, and may be "in great danger of being defeated, if some "proper remedy be not provided."

The act enacts (*e*), for remedy thereof, "that all common recoveries *suffered, or to* "*be suffered*, in his Majesty's court of Com- "mon Pleas at Westminster, or in any other "court of record in the principality of Wales,

(*e*) 14 Geo. 2, c. 20, Sec. 1.

" or in any of the counties palatine, or in
" any other court, having jurisdiction of the [68]
" same, of any honors, castles, manors,
" lands, tenements or hereditaments, with-
" out any surrender or surrenders of such
" lease or leases, or without the concurrence,
" or any conveyance or assurance from such
" lessee or lessees, or other person or per-
" sons claiming under such lessee or lessees,
" in order to make good tenants to the
" writs of entry or other writs, whereupon
" such recoveries have been, or shall be had
" or suffered, shall be as valid and effectual
" in law, to all intents and purposes what-
" soever, *as if such lessee or lessees, or any*
" *other person or persons claiming under him,*
" *her, or them, had conveyed, or joined in con-*
" *veying, or shall convey or join in conveying,*
" a good estate of freehold to such person or
" persons as has or have been, or shall be-
" come tenant or tenants to such writs of
" entry, or other writs, whereupon such
" common recoveries have been or shall be
" suffered."

And it is provided (*f*) " That nothing in
" this act contained shall extend, or be con-
" strued to extend, to make any common
" recoveries valid and effectual in law, un-
" less the person or persons intitled to the

(*f*) 14 Geo. 2, c. 20, Sec. 2.

" first estate for life, or other greater estate
" (in case there be no such estate for life in
" being) in reversion or remainder next after
" the expiration of such leases has or have,
[69]" by some lawful act or means, conveyed
" or assured, or joined in conveying or as-
" suring, or shall by some lawful act or means
" convey or assure, or join in conveying or
" assuring, an estate for life at the least,
" to such person or persons as has or have
" been, or shall become tenant or tenants to
" the writs of entry, or other writs, where-
" upon such common recoveries have been
" or shall be suffered."

From the exception it will be collected, that this act does not extend to persons who have estates of freehold, by act of law, as tenants by the curtesy, or in dower; or persons having estates for life under marriage settlements, wills, &c. or by any other means than leases *at reserved rents*.

This branch of the statute, in its positive and enacting part, is founded on the principle of the common law, as it applied to lands granted for particular estates, when the *reversion* continued *parcel* of a manor. In practice it was difficult to obtain the concurrence of these lessees; and though they, or those in whom their estate is vested, still are the persons against whom a writ of entry in a real *adverse* action must be brought, it

was perfectly reasonable to dispense with their concurrence in a common recovery, which is now merely a species of common assurance.

The act, it is observable, gives validity to all recoveries suffered prior to the act. But by a proviso, there is a saving which protects the titles of those who should have availed themselves of their rights of entry &c. anterior to the 16th June, 1740.

And it is assumed, that the law is not altered, except for the purpose of aiding recoveries, as common assurances. On this ground it is assumed, that *at present*, as formerly, every real *adverse* action must be brought against the actual freeholder, although he holds under a lease *at a reserved rent*.

And it may, perhaps, be contended, that a common recovery, suffered with the assistance of a lessee, having the *immediate freehold*, would be good, without the concurrence of the reversioner, entitled to receive the rent payable by such lessee, though the concurrence of such lessee is no longer essential, as formerly, to the validity of a common recovery.

In *Goodtitle*, on demise of *Bridges* v. Duke of *Chandos* (*g*), Lord *Mansfield* ob-[70]

(*g*) 1 Burr. 1072.

served, "it is now fully settled and esta-
"blished, that tenant in tail may, if he
"pleases, either turn his estate-tail into a
"fee, or alienate it for his own benefit by
"duly suffering a common recovery; but
"he must have a sufficient estate and power
"to qualify him to suffer such recovery,—he
"must either be the tenant in tail in pos-
"session, or he must have the concurrence
"of the freeholder who claims under the
"*same settlements.* This principle is ad-
"hered to by the statute of 14 Geo. II. c. 20.
"The tenant for life whose consent is neces-
"sary to the tenant in tail in remainder, to
"enable him to cut off the intail, is *not the*
"*lessee of the land* under a *beneficial lease;*
"but the original tenant for life claiming
"under the family settlement, and having a
"life estate settled upon him prior, in order
"of succession, to the other's remainder
"in tail."

These observations are introduced, for the purpose of remarking, that it is immaterial whether the first tenant for life has the freehold under the *same*, or a *different* settlement, or under any other conveyance, or a will. At the common law, with the exception already noticed, the person who had the
[71] freehold under a *beneficial lease*, was the person whose concurrence was necessary; and though the statute has dispensed with the

necessity of his concurrence, does it follow that his concurrence will not answer the purpose? Even when the reversion on leases for lives, remained parcel of the manor, a common recovery could not have been suffered of the particular tenements vested in these lessees distinctly from the manor, without the concurrence of the lessees, although their reversion and services would have passed inclusively by a recovery suffered of the manor, of which they were parcel. Before a conclusion that the concurrence of a tenant under a beneficial lease will not be sufficient, can be drawn, the statute of 14 Geo. II. must be construed to have made a material alteration in the law on this subject; and to have restricted a tenant in tail from availing himself of the concurrence of the person who, actually, and in point of law, is the freeholder. The act has no words of exclusion. It places the recovery suffered under the remedial part of the act, on the footing of a recovery duly suffered at the common law: thus allowing the inference, and even affording the illustration, that the recovery duly suffered, according to the rules of the common law, is to be supported.

The proviso is merely to controul the [72] enacting clause, and to show, that tenant in tail, when he availed himself of the provisions of the act, was not to be competent to

suffer a common recovery, unless he had the immediate estate-tail, or obtained the concurrence of the freeholder intitled to the receipt of the reserved rent.

In this place it may be observed as highly probable, that the necessity, at the common law, of the concurrence of the freeholder, though a mere beneficial lessee, or a usufructuary occupier, in suffering recoveries, &c. gave rise to leases for years, determinable on lives, so common in the western counties, as preferable to leases for life. Another advantage, indeed, resulting from this species of lease is, that renewals may be granted of additional interests by way of *interesse termini*, so as not to affect the remedy for rent or benefit of the covenants under former leases. A still further advantage, resulting from these leases for terms is, that the renewal may be made without a surrender by mortgagees, trustees, &c. and the legal title under the subsisting term may be left undisturbed.

Thirdly. Recoveries will be good as between the parties themselves and their heirs, notwithstanding the freehold is not in the person named as the tenant in the writ of entry. Between these parties, and all who
[74] claim under them, the recovery operates as a *conveyance*, and has the effect of an *estop-*

pel (*h*). On this point some further observations will be added, in considering recoveries, by *estoppel* (*i*).

Regulations by Statute, concerning the Evidence of Recovery, from Deed making Tenant to the Writ of Entry. [74]

The statute of 14 Geo. II. c. 20, as has already been observed, has made recoveries good, notwithstanding the fine or deed making the tenant to the writ of entry, shall be levied or executed *after the time* of the judgment given in such recovery, and the award of the writ of seisin, provided the same *appear* to be levied, or executed, before the end of the term, &c. in which such recovery was suffered, and the persons joining in such recovery had a sufficient estate and power to suffer the same.

By the same statute (*k*), for the purpose of protecting purchasers from neglect, " in entering recoveries of record, purchasers " *bona fide*, and for a valuable consideration, and all claiming under them, *having* " *been in possession of the purchased estate,* " *or estates, from the time of such purchase,* " shall and may, after the end of 20 *years* " *from the time of such purchase,*" (not the time of suffering the recovery,) " produce

(*h*) Supra, 5.
(*i*) Infra. 86.
(*k*) Sec.

" in evidence *the deed or deeds*, making a
" tenant to the writ or writs of entry, or
" other writs for suffering a common reco-
[75]" very, or common recoveries, and de-
" claring the uses of a recovery or re-
" coveries; and the deed or deeds so
" produced (the execution thereof being
" duly proved) shall in all courts of law and
" equity, be deemed and taken as a good
" and sufficient evidence, for such purchaser
" and purchasers, and those claiming under
" him, her, or them, that such recovery or
" recoveries was or were duly suffered and
" perfected, *according to the purport* of such
" deed or deeds, *in case no record can be*
" *found of such recovery or recoveries, or the*
" *same should appear not to be regularly en-*
" *tered on record:* provided always that the
" person or persons making such deed or
" deeds as aforesaid, and declaring the uses
" of a common recovery or recoveries, had
" a sufficient estate and power to make a
" tenant to such writ or writs as aforesaid,
" and to suffer such common recovery or
" recoveries."

That this statute may apply, the deed must be sufficiently formal to show, that the steps intended to be taken, for the purpose of suffering the recovery, were such as were proper for suffering an effectual recovery. The act does, in effect, make the deed evi-

dence of the recovery, in those instances which are within the scope of the statute. Hence the object and the use of the clause, declaring the intent of the conveyance, for making a tenant to the writ of entry, and detailing the substance of the intended pro-[76] ceedings. In transactions of considerable importance, in which security of title is more an object than economy in expence, the common form which details the order of the proceedings should be observed. This form, with a general notice of the variations which take place under different circumstances, will be added in the *Appendix, page* 481. It may be proper also to observe that the deed is evidence of the regularity of the proceedings in those instances only, *in which there are not any proceedings to rebut* the *presumption*, or in which the *irregularities* are in the *entries*.

Of Cases in which the Law does, and does not, [77 *admit of the Presumption that there was a good Tenant to the Writ of Entry.*

In some cases, the courts will presume the concurrence of the freeeholder in the recovery; for instance, when the possession has, for a long time, accompanied the title under the recovery (*l*).

Or when there has been *collateral* evi-

(*l*) *Green* v. *Proud*, 1 Mod. 117.

dence, to raise the presumption of a surrender by the person in whom the freehold was vested; as entries in the attorney's books of a surrender prepared and paid for (*m*).

Except when there are circumstances to raise the presumption, (as possession under the recovery, or the like,) the court will not presume a surrender (*n*).

And though a recovery would, under circumstances, be presumed to be good, yet the presumption may be rebutted, by the production of deeds, which show a defect of title under the recovery, and prove that
[78] there was not a good tenant to the writ of entry, and then the recovery may be impeached (*o*).

The general outline of the doctrine of the presumption of law, as it applies to this subject, is fully explained by Lord *Mansfield*, in giving judgment in the case of *Goodtitle ex dem. Brydges* v. *Duke of Chandos* (*p*). He said, "Where a person has "power to suffer a recovery, and thereby "bar the estate-tail, *omnia præsumuntur* "*rite et solemniter acta*, until the contrary

(*m*) *Warren on the demise of Webb* v. *Grenville*, 2 Stra. 1129. 2 Burr. 1071.

(*n*) *Goodtitle on dem. Bridges* v. *Duke of Chandos*, 2 Burr. 1065.

(*o*) *Keen ex dem. Earl of Portsmouth* v. *Earl of Effingham*, 2 Stra. 1267.

(*p*) 2 Burr. 1073.

" appears; and it is reasonable that it
" should be so. But if the contrary shall
" appear, there is an end of the presump-
" tion. This was the case of the Earl of
" *Suffolk's* recovery, upon a trial at bar in
" this court in Easter Term, 1747. There,
" the contrary did appear: and the pre-
" sumption was thereby destroyed. There
" were *blundering deeds actually produced*,
" which appeared clearly to be wrong; and
" it was manifest, upon the evidence dis-
" closed, that there was no good tenant to
" the præcipe. It was therefore impos-
" sible for the court, in that case, to pre-
" sume that there was one.

" But if a man has power to suffer a
" recovery, that is, a solid and reasonable
" ground for presuming that all was done [79]
" rightly and regularly; unless something
" to the contrary shall appear.

" So, where the freehold is in a trustee
" for the tenant in tail himself, and under
" his power and direction, it is a reasonable
" and just cause for presuming that every
" thing was regularly transacted.

" So, where the person, or persons in-
" terested to object against the validity of a
" recovery have had an opportunity to make
" objections to it; but, instead of doing
" so, have acquiesced under it, and not at
" all disputed its validity; this is a pre-

" sumption that all was right and regular,
" forasmuch as they never did object to it.
" But there can be no presumption of
" the nature of evidence, in any case, with-
" out something from whence to make it;
" some ground to found the presumption
" upon. Whereas here is absolutely nothing
" from whence to presume; no sort of
" ground to build any presumption upon.
" The single pretence, to any the least
" ground of presumption in the present
" case, can be only this, that no tenant in
" tail, in remainder, would suffer a reco-
" very, without first getting a surrender of
" the life-estate, in order to make it valid
" and effectual.
" But even that ground, (slight as it is,)
" will not hold in the case now before us;
[80]" for it does not at all appear, upon the
" report of the judge, that Mr. *George*
" *Brydges* (who suffered the recovery in
" question) had the least intention whatso-
" ever to include those particular lands in
" the recovery which he suffered, and had a
" full power in himself alone, to suffer, of
" all the rest of the estate, whereof he was
" at that time tenant in tail in possession.
" He was then in possession of the manor
" of Keynsham, and of other lands in Keyns-
" ham sufficient to answer the general de-
" scription used in the recovery, relating

" to such part of the recovered estates as
" lay in Keynsham. He must probably
" know, or have been informed by his coun-
" sel or agents, that he could have no such
" power over the settled part, without ob-
" taining a surrender of the life-estate.
" He might perhaps be satisfied, that he
" could not obtain a surrender of the life-
" estate in these settled lands: or, he
" might have attempted to obtain it, and
" failed in such attempt.

" If the mere single fact of the remainder-
" man in tail suffering a recovery, was alone
" sufficient to ground a presumption of a
" surrender of the life-estate, it would be
" in the power of every remainder-man in
" tail to bar the estate-tail, notwithstanding
" the tenant for life should absolutely refuse
" to join with him in suffering a recovery.
" Therefore it is necessary that there [81]
" should be facts and circumstances to
" ground a presumption of such a surren-
" der upon.

" Whereas, in the present case, it is so
" far from being reasonable to presume
" that there was such a surrender from the
" jointress, in order to bar the estate-tail in
" remainder, and give the power of disposal
" to George, in prejudice to James Bridges;
" that there are, on the contrary, many rea-

" sons to induce a suspicion, that there was
" not such a surrender. She might have
" more regard for James than for George ;
" she might have a friendship for James,
" and a dislike to George ; she might think
" it wrong or unkind to hurt the reversi-
" oner; or even whim and peevishness might
" prevent her from interfering : there is no
" defining the various reasons she might
" have to hinder her from surrending her
" life-estate for such a purpose.

" Mr. George Bridges being only tenant
" in tail in remainder, and the life estate,
" under *the same settlement*, still subsisting
" at the time of his suffering the recovery,
" it is clear that he had no power to alien
" or to bar. And there is nothing from
" whence to presume a surrender of the
" life-estate, to enable him to do so.

" If he had a power to bar or alien, then
" indeed no presumption could have been
[82] " too large, in order to prevent slips in
" legal forms and methods of conveyance,
" and effectuate the intention of a person
" who had a legal right to do such an act.

" The act of 14 Geo. II. c. 20, means to
" preserve the same negative to persons
" claiming under the family settlement as
" they had before.

" And no argument can be drawn in the

" present case, from length of time ; because " the jointress died but in 1759 ; and the " ejectment was instantly brought."

On another day his lordship said, " he " had looked into his own notes of the case " of *Warren*, on the demise of *Webb*, against " *Greenville*, where the recovery was of forty " years standing ; and the court did lay it " down, in that case, ' That *after a reco-* ' *very of forty years standing, they would,* ' without any other circumstances, *presume* ' *a conditional surrender to have been made by* ' *the tenant for life ;* and they relied upon ' 1 Ventr. 257, and Mr. Pigott's Book, p. 41.' " But his lordship observed, that there " are other circumstances, in the case in " *Ventris*, and there is nothing in *Pigott* to " justify this general position. And he " added, that in the case then at the bar, " the court did (as he had taken it down) " admit as evidence the entry in the attor- " ney's book, as had been mentioned.

" He said he was rather more strongly of " opinion than he was yesterday, ' That in[83] ' the present case, there is no ground for a ' presumption that there was any surrender ' by the tenant for life.' Here are two par- " ticular reasons against making any such " presumption. One is, that there does not " appear to have been any intention in the " remainder-man in tail, to suffer a recovery

" of these particular lands: the other is,
" that here was no possession at all, under
" this recovery ; but, on the contrary, the
" ejectment was brought, and the validity
" of the recovery put into litigation, im-
" mediately after the death of the tenant
" for life.

" If the eldest son, who has a remainder
" in tail under a family settlement, should
" privately suffer a common recovery, and
" his father live many years afterwards ; it
" might as well be argued, that length of
" time from the date of the recovery should
" induce a presumption that the father sur-
" rendered his estate for life.

" And his lordship declared himself as
" clear, that if there had been a long pos-
" session by the tenant in tail, after the
" death of the tenant for life ; though such
" a possession might be ascribed to the
" entail, the presumption ought to have
" been made upon the ground of acquies-
" cence under it, and the probability arising
[84]" therefrom, that the parties knew that the
" recovery was not defective.

" His lordship further added, that he
" would have it understood, that possession
" of the tenant in tail, after the death of
" the tenant for life, does leave a ground of
" presumption that there was a surrender.
" But in the present case, here is no posses-

" sion after the death of the tenant for life:
" the ejectment was brought immediately."

To these observations it may be added, that the strongest possible ground for the presumption of a surrender is, that the tenant in tail *had the possession* at the time when he suffered the recovery.

The next degree is, that though the tenant in tail was not, in fact, actually in possession at the time of suffering the recovery, the possession was afterwards held in opposition to the tenant for life, the issue in tail, &c.—In short, the former is the presumption arising from a fact,—the latter from acquiescence.

Any act done by the tenant for life, as owner, subsequent to the recovery, rebuts the presumption of a surrender (*q*). In *Barley's* case, the person by whom the recovery was suffered had accepted a lease derived under the title of the jointress; so that there was an acknowledgment on his part [85] that the estate for life was continuing.

And by the stat. 14 Geo. II. c. 20. sec. 5,
" it is provided, that every recovery already
" suffered or hereafter to be suffered, shall,
" after the expiration of twenty years, from
" the time of the suffering thereof, be deemed
" good and valid to all intents and pur-
" poses, if it appears, *upon the face of such*

(*q*) *Haines Barley's case*, 5 Mod. 210.

" *recovery*, that there was a tenant to the " writ, and if the persons joining in such re- " covery had a sufficient estate and power to " suffer the same, notwithstanding the deed " or deeds for making the tenant to such " writ should be lost, or not appear."

This branch of the act does not extend to any case in which the deeds making the tenant, are produced. It merely applies to those cases in which the deeds making the tenant, &c. are lost. When, therefore, the deeds are in existence, and produced, they may defeat the operation of a recovery, which, in the absence of such deeds, would have been presumed to have been good.

For this reason a purchaser will not accept a title depending on a common recovery, without great caution, unless the deeds are produced, since he has no certainty of the uses, &c. and since he runs the risk that the deeds, if produced, might expose the title to the objection of being defective.

[86] *Of Recoveries operating by Estoppel, without a good Tenant to the Writ of Entry: and of the Necessity of the Concurrence in a second Recovery, or the Deeds preparatory thereto, of a Tenant in a former Recovery: with Observations, by Way of Caution, to guard against the Inconvenience sometimes experienced from the present Practice.*

A recovery suffered by *a tenant in tail* without a good tenant to the writ of entry, is voidable by the issue in tail, and those in remainder or reversion. It is *voidable* only, not void.—At least, this is the conclusion which it will be attempted to establish. But a recovery suffered by a person who has the *inheritance, not intailed,* will be good as against himself and his heirs; although the freehold be not vested in the person named as tenant to the writ of entry.

It is also apprehended that a recovery suffered by a tenant in tail, upon a writ brought against a person not tenant of the freehold, will be binding on him, and continue in force till avoided.

In the *Marquis of Winchester's case* (*r*), the person by whom the recovery was suffered had the freehold *jointly* with Anne Mills, and also the inheritance in tail; and it was [87] agreed, "that for the moiety of which Anne "Mills was tenant for life, the recovery was "not any bar, either to the estate-tail, which "Lionel" (the person by whom the recovery was suffered) "had expectant on the estate "of Anne Mills, or to the remainder of "Henry, because for this moiety, Lionel "was not tenant to the præcipe; but the "recovery had its operation against him

(*r*) 3 Co. 3. b.

" by estoppel and conclusion, which shall " not bind the issue in tail, who claims " *per formam doni.*"

So in *Owen and Morgan's* case (*s*), a husband, tenant by intireties with his wife, had suffered a recovery, as tenant, without the concurrence of his wife ; and it was agreed that the recovery, as to the estate of the husband, took its effect by estoppel and conclusion.

And in the case of *Lincoln College* (*t*), although a recovery was deemed defective against the issue in tail, it was considered to bar the party himself, so that he could not enter into the land.

And in *Say and Sele's* case (*u*) the language of the court was, that " common recove-
[88]" ries, although there are no tenants to " the *præcipes*, are good by way of estop- " pels, against the parties who suffer them, " though not against remainder-men, stran- " gers," &c.

And in *Webb* v. *Nect*, (*w*) a bargain and sale was made, and a recovery suffered to uses, by a person seised *in fee*, in reversion expectant on an estate of freehold. " Two " points were moved. First, If the uses ex- " pressed in the indenture of bargain and " sale were good ? 2d, If the recovery suf-

(*s*) 3 Co. 5.
(*t*) 3 Co. 59.
(*u*) 10 Mod. 40.
(*w*) Cro. Eliz. 21.

" fered against him in the reversion, where " the freehold was in a stranger, shall bind " the reversioner and his heirs? And the " court held clearly, as to the first point, " that the limitation to the uses, as this " case was, was good. 2d, That the recovery " was good against him in the reversion and " his heirs, and they commanded judgment " to be entered accordingly."

So in *Shelley's case* (*x*), it was said, " if the " tenant in fee-simple makes a lease for " life, and suffers a recovery, he and his " heirs are for ever concluded; but if tenant " in tail be of a reversion expectant on an " estate for life, and he suffers a reco- " very, and hath judgment to recover over " in value, yet his issue shall avoid the reco- " very, for he shall not be estopped, because " he claims *in performam doni*."

In *Barker* v. *Keate* (*y*), *North*, Chief Jus- [89]
tice, observed, " that if a real action be " brought against A. who is not tenant to " the *præcipe*, and a recovery be had against " him, the sheriff can turn him out who is " in possession; but if he, who is not in pos- " session, come in by voucher, he is estop- " ped to say afterwards, that he was not " party to the writ, so that he who is

(*x*) 1 Co. 96. (*y*) 2 Mod. 249.

" bound must be tenant or vouchee, or " claim under them."

These are the more ancient and leading authorities to be met with on this point. They are summed up by Mr. *Pigott*, (*z*) who has given the points of difference, in these terms: " If there be a tenant for life, " remainder in tail, remainder in fee, if he " in remainder in tail, suffers a common re- " covery, it bars not the entail because no " tenant to the præcipe; but if he in re- " mainder in fee suffers a recovery, that " bars his heirs, as has been said before."

In a late case (*a*), where the person, intended to be tenant to the writ, was misnamed in the deeds and recovery, the question was, whether a recovery, suffered by a tenant in fee, without a good tenant to the *præcipe*, had the effect of revoking a will, the court of *Common Pleas* decided that the will was revoked, and observed " that the " tenant in fee was estopped, by what ap- " peared upon the record, and, if living, " could not say that there was no good te- " nant to the *præcipe*, and that every person " claiming under him must be estopped " also."

These observations lead to some impor-

(*z*) Page 37. *Bp. of Llandaff.* 2 New
(*a*) *Doe d. Lushington v.* Rep. 504.

tant conclusions, applicable in practice to cases in which a recovery has been suffered by tenant in tail, and the recovery is voidable, for want of a good tenant to the writ of entry.

They also lead to some observations respecting the practice of requiring that the person, to whom a tenant in tail has conveyed, preparatory to a recovery afterwards [90] suffered, and which is defective for want of the immediate freehold in the tenant, shall be either the tenant in a new recovery, or shall join in making the tenant to that recovery.

First. Sometimes the deed contains *more parcels than the recovery.* In this instance, unless the recovery shall be amended, it is clear that the freehold of the lands, not included in the recovery, remains in the person named as tenant; and, of course, on suffering another recovery, a conveyance must be obtained from this person or his heirs, or a writ of entry must be brought against him or his heirs. This is universally, and very justly, the practice. The necessity of this practice might be prevented by an express declaration to this effect: "*Provided always and it is hereby* "*declared, &c. that if the said* (the "tenant) *shall not, on or before the* "*day of , pay to the said his* "*executors or administrators, the sum of*

" £100,000; *then, and in that case such, and*
" *so many, and such parts, if any, of the mes-*
" *suages, &c. as shall remain vested in the said*
" (the tenant) *after the said day of*
" *by reason of any defect in the said intended*
" *recovery, or otherwise, shall, from and after*
" *the said day of , remain, conti-*
" *nue, and be,—, and that the said*
" (the tenant) *and his heirs shall stand and be*
" *seised, &c.—, and that these presents, &c.*
" *shall operate and enure—, to the uses, &c.*
" *hereinbefore limited, expressed, and declared*
[91]" *of and concerning the messuages, &c. which*
" *shall be or are intended to be comprised in*
" *the said recovery, &c.*" This declaration will operate as a shifting use, even though there be a conveyance to the use of the tenant in fee. But it is to be remembered that no shifting use is admissible, unless there be a conveyance of the legal seisin, so that uses may be declared, to operate and take effect through the medium of the statute for transferring uses into possession. Such a limitation is not admissible in a bargain and sale,—to operate as such, under the statutes of uses and inrolments, unless part of the consideration proceeds from the *cestui que use*.

Secondly. Sometimes a recovery is suffered by a person who has merely an estate-tail in remainder or reversion, after an

estate of freehold, without obtaining the concurrence of the freeholder. In this case, as has already been observed, the recovery is considered as voidable, and not as merely void.

During the continuance of the freehold in the previous tenant for life, another effectual recovery cannot be suffered without his concurrence: but, with his concurrence, and without calling on the tenant in the recovery to join in the conveyance, an effectual recovery may be suffered. Even under these circumstances, if the former conveyance to the intended tenant passed the fee, the title, (independent of any question on the validity of the recovery,) will be exposed to the objection, that the *legal estate* of inheritance is in the person to whom, for the purpose of making him tenant to the former recovery, it was conveyed.

When the defect in the recovery is to be [92]
supplied, after the previous estate of freehold has determined, it is the practice to require the tenant in the former recovery, or his heirs, or devisees, if any, to be tenant, or tenants. in the new recovery; or that he or they should join in a conveyance, for making a tenant to that recovery. With a view to objections by other counsel, it is not prudent in preparing recovery deeds, to forego this caution, when there is an opportunity of obtaining the requisite conveyance.

But whenever it shall be necessary to support a title, on an adverse litigation, merely on account of the want of such conveyance, it may be contended, (and, it should seem, with great chance of success,) that the former recovery was good, as between the parties; that the estate conveyed to the tenant was drawn out of him by the operation of the recovery; and that the declaration of the uses governs the legal title, as between these parties. To this reasoning it would possibly be objected, that the issue in tail, and those in remainder, are not bound by estoppel. This, as an abstract proposition, is not denied, nor will it affect the conclusion which has been offered. A recovery, good as between the parties, may be voidable, as against the issue, &c. because they are not bound by estoppel.—But although they are not bound by the estoppel of the recovery,
[93] it by no means follows that the conveyance is not good till avoided, so as to govern the legal title to the freehold. On the contrary, the conveyance of tenant in tail has, as against himself, precisely the same operation as a conveyance by tenant in fee has against that tenant.

A conveyance by tenant in tail, by lease and release, by feoffment, or by fine without proclamations, &c. is an effectual conveyance by him, of a *base* fee, or of a defeasible

fee; and consequently of the freehold; although it does not bind the issue. It operates, however, against the issue so far, that they must make their *entry or claim,* or, (if there be a discontinuance,) bring their *action,* to defeat the estate: and the person in whom the freehold resides under the assurance, must be considered as the tenant whom they are to sue.

The same reasoning, and the principles on which it is grounded, prove that when the freehold passes, as between the parties, by way of conveyance, it must pass as against all mankind: and indeed there is an absurdity in supposing the same person to be tenant of the freehold, as against all mankind, except the issue in tail, and those in remainder; more especially, as it is of no consequence to the issue, &c. who is the tenant.—All that is necessary for their sake is, that there shall be a person on whom their entry may be made, or against whom their [94] action may be brought (*b*).

In point of law, the person deriving a title under this imperfect, or voidable conveyance, is the person against whom the issue must bring their action, should they resort to an action to establish their right; and this result seems incontrovertibly to prove that this person has the freehold.

Since these observations were first

(*b*) Essay on Estates, chap. Freehold.

dictated, this point has been fully considered, on a case which arose and called for its application in practice. On that case, the reasoning offered in support of a sixth recovery, after five defective recoveries, was to this effect.

" In *Wood's Conveyancing*, chapter Recoveries, under the head of avoiding recoveries, it is said, that the recoveror himself cannot falsify a recovery ; and this proposition is given by way of contrast to the instances previously stated, of recoveries voidable for different reasons, and one of them is, that the recovery may be avoided, for that he, against whom the writ of entry is brought, is not tenant of the freehold, by right or wrong, at the time of the writ brought.

" And the language of *Pigott* on Recove-
[95]" ries (p. 169) is, that an erroneous common recovery is good till reversed, by reason, as he observes, of the intended recompense. This, however, is not the true reason. In point of law, the recovery amounts to a conveyance, as between the parties, when one of them has a seisin ; and as an extinguishment by estoppel, when there is merely a right of action or of entry.

" And in the *Marquis of Winchester's* case, (3 Co. 1,) it was said that common recoveries, as much as any benign inter-

" pretation of the law will permit, ought
" to be maintained, because they are the
" common assurances of the land. But it
" was agreed that for the moiety whereof
" Anne Mills was tenant for life, the reco-
" very was not any bar either to the estate-
" tail which Lionel had, expectant on the
" estate of Anne Mills, or to the remainder
" of Henry, because that for this moiety
" Lionel was not tenant to the *præcipe;*
" but the recovery had its operation against
" him by estoppel and conclusion, which
" shall not bind the issue in tail, who
" claims *per formam doni.*

" So in *Owen* v. *Morgan*, (3 Co. 5,) the
" case was supposed to be the same as if the
" husband had had a remainder in tail,
" expectant on an estate for life: in which
" case, the book continues, a common reco-
" very had against him shall not bind be-
" cause he was not tenant to the *præcipe*, [96]
" nor seised by force of the tail; but the
" recovery, as to the estate of the husband,
" took its effect by estoppel and conclusion,
" and therewith agrees 12 Ed. IV. 14. b.
" that against a common recovery against
" the ancestor in tail, the issue may say, that
" the ancestor was not tenant *tempore brevis.*

" Both these cases suppose the recovery
" to be good between the parties, and conse-
" quently, they must operate as a conveyance.

"And the issue in tail and those in remainder
" are driven to their writ of error, to avoid
" the recovery. And it would be highly incon-
" venient that the tenant in tail should *conti-*
" *nue seised*, contrary to his own solemn act:
" or that the person to whom he conveys,
" and who is named tenant in the proceed-
" ings towards the recovery, should be at
" liberty to defend himself, and consequent-
" ly, retain the estate, by alleging the inca-
" pacity of the tenant in tail to suffer a
" recovery, which will be binding against
" his issue and those in remainder. And
" it cannot be supposed that if the demand-
" ant acquires a seisin either in fact, or in
" law, he can claim to be exempt from the
" uses declared of his estate.

" Mr. *Cruise* also admits that a common
" recovery may be good by estoppel.—See
" Essay on Recoveries, page 271.

" Mr. *Pigott* also (p. 123) allows that if
" there be no tenant to the *præcipe*, yet, if
" the party who suffers the recovery has a
" fee-simple, he and his heirs are estopped.
[97]" The like proposition will be found in 2
" *Cruise*, p. 90; and when he says, this is
" only where the person who suffers the
" common recovery is tenant in fee, he
" must be understood, (and the context
" evidently shows it,) as applying his obser-
" vation to the effect of the recovery, as

" against persons claiming *per formam doni*,
" and not to its effect or operation, as
" against the tenant in tail himself: nor even
" to deny that the recovery is good, even
" against the issue in tail, &c. till avoided.

" The point is more clearly stated in the
" same book, p. 271, in these terms: A com-
" mon recovery when suffered of an *estate-*
" *tail*, will not operate as an estoppel
" against the issue in tail, the remainder-
" man or reversioner. But even if Mr.
" *Cruise* wishes in the former passages, to be
" understood in any other sense than the
" one I have ascribed to him, the authori-
" ties to which he refers do not support
" his conclusion.

" In *Bennet and others v. Vade and others*,
" (9 Mod. 314,) Lord Chancellor *Hardwicke*
" treats a recovery by tenant in fee-simple,
" as good to bind him and his heir by
" estoppel, although there is not any tenant
" to the præcipe. And adds, The reason
" why there is no want of a tenant to a
" præcipe, in a recovery by tenant in fee,
" is this; that if such præcipe is brought
" against a stranger who is not tenant, and
" he vouch the tenant of the lands, and he
" enters into warranty, by that he admits [98]
" the stranger to be tenant of the lands, and
" so binds himself and his heirs by estoppel.
" He proceeds to observe, But if he had

" been tenant in tail, this would not have
" *estopped his issue*, because he claims by a
" superior gift, *per formam doni*, and not
" through or by his ancestor. And, in the
" case before the court, he said these reco-
" veries have revoked the will, and Sir
" John Leigh has by them regained a new
" estate to the purpose of revoking the
" will, although it be the old one. In short,
" the recovery had the effect of passing the
" inheritance to the demandant, and for
" want of an express declaration of uses,
" (for so the case appeared upon the facts)
" the use resulted. This then is an admis-
" sion that in the case of a tenant in fee
" suffering a common recovery, without a
" good tenant to the præcipe, the seisin
" passes to the demandant, so that the uses
" may arise on his seisin, and be expressly
" declared, or result by operation of law.

" Also in *Duke* and *Smith's* case, (4 Leon.
" 238,) it was agreed, that if he in reversion
" suffered the common recovery to uses,
" his heirs cannot plead that his father had not
" any thing at the time of the recovery, for
" he is estopped to say that his father was
" not tenant to the præcipe, and therefore
" it is a good recovery against him by way
" of estoppel.

[99] " So in *Bull* and *Wyatt*, upon a special
" verdict it was adjudged, (see 1 Roll's

" Abr. 865, l. 11,) that if A. seised in
" fee of land, is disseised of this by B.,
" and during the disseisin a præcipe is
" brought of this by D. against A., who
" suffers a common recovery of this, to the
" use of D. the recoveror, although this is
" in truth a void recovery for want of a
" tenant to the præcipe, yet it shall be a
" good recovery by estoppel, to bind A.
" his heirs and assigns ; but in this instance
" it is apprehended the recovery operated
" by way of *extinguishment*, and not by
" way of *conveyance*.

" *Webb* v. *Nect*, (Cro. Eliz. 21,) also de-
" cided, that a recovery is good against the
" tenant in fee, by estoppel, though the
" freehold is in another person.

" And the language of the court in *Lord
" Say and Sele's* case, (10 Mod. 45,) is, that
" common recoveries, although there are
" no tenants to the præcipes, are good by
" way of estoppel, against the parties who
" suffered them, though not against remain-
" der-men and strangers, &c.

" The greater part of the authorities are,
" (it must be admitted,) applied to the case
" of a tenant in fee, who suffers a common
" recovery. Yet it is understood that tenant
" in tail is precisely in the same predica-
" ment for this purpose as tenant in fee:
" with the difference only, that in the case

" of a tenant in fee, the recovery cannot be
[100]" avoided ; while, in the case of tenant in
" tail, it may be avoided by the issue in tail,
" or those in reversion or remainder ; but
" it remains in force till avoided. And
" when the principles, on which recoveries
" are founded, are traced through *all their*
" *circumstances ;*—when we follow Mr.
" ————————'s very just conclusion, that
" the recovery of 1772 would certainly
" estop *Luxford* and his heirs from alleging
" any thing contrary to it ;—when we also
" consider that the parties to the judgment,
" of a court of competent jurisdiction, are
" bound by that judgment ;—that if the
" seisin does not pass to the demandant, it
" must remain in the tenant ;—and that
" the tenant or his heirs cannot, after judg-
" ment, aver that he was not tenant, though
" he might in the first instance have pleaded
" non-tenure ;—and that there is no appa-
" rent error in the recovery, and that the
" parties to the judgment can avoid it only
" for error apparent on the record, and not
" for an extraneous fact, as non-tenure, &c.
" of the tenant ;—we may, (it is submitted,)
" satisfy ourselves that the seisin, which
" was vested in *Luxford*, was drawn out of
" him by the operation of the recovery, and
" passed to the demandant, and supplied
" a seisin to the uses, and, consequently,

" conferred a title to the freehold, under " which the recovery in question may be " supported."

No answer was given to this reasoning by a gentlemen, whose knowledge and acute-[101] ness would have enabled him with great ease, to detect any fallacy in the observations. The probability is that he did not find any authority, or any principle, to oppose to the reasoning, on which the observations are grounded.

To sum up these observations. It should seem that tenant in tail is *personally* bound by all such acts, as will bind a tenant in fee. The necessary deduction is, that the recovery will be good, so far that it will pass the estate, as between the parties, though it will not bind the issue, or those in reversion or remainder, because they are not bound by estoppels.

Admitting the recovery to be good between the parties, though not binding on the issue, &c.; it will have the effect of a conveyance: the demandant will obtain a seisin: and uses may be declared of that seisin, and arise from the same, and be executed into estate.

The uses then will govern the title to the legal estate. Such recovery, though voidable, is not actually void. And, in the mean time, till avoided, the legal title must be

traced through this recovery ; and, granting this reasoning to be correct, the freehold is in the *cestui que use* under the recovery, and not in the person to whom a conveyance was made of an estate of freehold, though
[102] not of the immediate freehold, for the purpose of suffering the recovery. The obvious and necessary conclusion is, that there is not any absolute occasion, when suffering another recovery, to call for a conveyance from the person named as tenant in the former recovery. These observations will deserve to be weighed, when a title shall require the aid of argument in support of its validity.

Thirdly. Sometimes the conveyance, for making the tenant to the writ of entry, is defective, in point of form, or of substance : as in the instance of a bargain and sale, for want of inrolment : or a feoffment, for want of livery of seisin ; or a release, for want of an estate capable of enlargement : so that no estate, (not even a voidable one) passes, nor is the conveyance operative in any other mode : and consequently there is not a good tenant to the writ. In this case, the concurrence of the tenant, in suffering the second recovery, cannot be necessary, since he never had any freehold. But the recovery, it should seem, is good as between the parties ; and the observations

on that point, already given in the last division, are equally applicable to cases falling under the present head.

Fourthly. When the conveyance is good, and the recovery is bad,—so as to be absolutely void, and not merely voidable, (as when it does not comprise the parcels,) the converse of the last proposition will be true.

Fifthly. Sometimes the recovery is suf- [103]
fered in the first instance; and afterwards, that is to say, after the end of the term, and by deeds dated subsequent to the term, the freehold is conveyed to the tenant.

This recovery is objectionable. It seems clearly voidable by the issue, and those in remainder and reversion, for want of a good tenant to the writ of entry; and it would be highly imprudent to suffer another recovery, without calling for a conveyance from the intended tenant, or naming that person as tenant in the new recovery. In short, it would be extremely difficult to support the second recovery, without such concurrence. But it might, if necessary, be contended, that the declaration of uses, in the language in which this declaration is generally penned, is sufficient to govern the uses, not only of the recovery so suffered, but also of the conveyance itself. For this purpose, an argument to be urged is, that the recovery

is good, as between the parties: that, as between them, the conveyance and the recovery form part of the same assurance: and that on the latter ground, and also on the language and general form of the declaration of uses, when well penned, the uses of the conveyance will be directed by the declaration in this deed, though the deed be subsequent to the recovery.

To obviate as far as may be, the difficulties in practice arising from the circum-
[104] stances which have been noticed, two cautions are proper to be observed.

First. Never (except in the cases afterwards noticed) *to convey to the tenant for any longer period, than during the joint lives of himself and the tenants in tail, who are to be vouched.* Thus the estate conveyed to the tenant will determine with his death, and there will not be any necessity for resorting to his heir at law, or devisee; or, (which shall first happen,) it will determine on the death of either of the tenants in tail; and therefore, unless the recovery shall be duly suffered in the first instance, and during the joint lives, the title will not be fettered. And, if further uses are to be declared, as in marriage settlements, &c. these uses may be superadded upon the conveyance: only *taking care to make the conveyance in fee, for supplying a seisin to the uses; and by*

the declaration of use on the conveyance, to limit the estate which is to be the ground-work of the recovery, for the joint lives of the tenant, &c.

The recovery may then be declared to enure to the uses which are limited after, and expectant on, the estate for the joint lives, in confirmation of,—and for the purpose of giving effect to,—the same uses, discharged of the estate for the joint lives: Or a still neater and more simple way, see Appendix, p. 489, 491, of accomplishing this object will be *to limit the use on the* [105] *conveyance to the tenant during the joint lives; and from and after the determination of that estate, to the uses afterwards declared of the recovery thereby agreed to be suffered: and then to add the uses after the agreement to suffer the recovery.* See Appendix, page 376, 381.

Secondly. To take care never to introduce *more parcels* into the recovery deed, than are intended to be comprised in the recovery; and whenever general words are used, for the purpose of describing the parcels, these general words should be confined to the lands in those townships or parishes alone, which are to be named in the recovery. Nor will it be irrelevant to observe, that the proposed conveyance in fee, and declaration of ulterior uses, are

necessary only when some persons, not intended to be parties to the recovery, as *vouchees*, are to pass the legal or equitable seisin of the freehold or inheritance. Suppose a tenant in tail to be desirous of suffering a common recovery, to the uses of a settlement made by him, or by any other person,—or to uses to prevent dower; and he alone has the freehold and first estate of inheritance; and the tenant to the writ of entry is made by a deed which passes a particular estate, as for the joint lives, &c.: uses may be well declared of the inheritance, upon this recovery; for the fee sim-
[106] ple passes to the demandant by means of the recovery, and uses may be declared of his seisin.

It is observable too, that whenever the cause of shifting use, recommended in a forme page (c), is adopted, that clause will effectually obviate all difficulty on the points which have been noticed.

Before this division is brought to a conclusion, it is expedient to observe, that when a tenant in tail has conveyed a base fee, and afterwards departed this life, without suffering a common recovery, or discontinuing the reversion or remainder, the estate he has transferred *ipso facto* determines, as against the persons seised in

(c) Supra, p. 90.

reversion or remainder. It is voidable only, and not void, as against the issue in tail,—and when a fine with proclamations has been levied, the issue are precluded from avoiding the alienation.

Should the heir in tail, after a conveyance of a base fee by his ancestor, enter, and suffer a common recovery, without taking a conveyance from the assignee under the voidable estate, an opinion, given upon great consideration, was, that the base fee was avoided,—the estate reduced to the issue,—and a recovery suffered by him, on a *præcipe* brought against his own assignee, was effectual. In such case the heir in tail should, after suffering a recovery, carefully refrain from taking a recovery from the absence of the tenant in tail.

Of the Concurrence of Persons who have particular Estates, to enable a Remainder-man or Reversioner in Tail, to suffer a Recovery; and the Cautions under which such Concurrence may be safely given. [107]

It often happens that persons who have the freehold, and whose concurrence is necessary to enable the tenant of an estate-tail, in remainder or reversion, to suffer a common recovery, would willingly afford their assistance, if they were advised such

assistance might be afforded, without incumbering their own estates, or destroying powers, &c. annexed to their estates. From an apprehension that their estates might *merge* in the reversion or remainder, and be affected by incumbrances affecting the estate-tail, the owners of the freehold frequently refuse to join in a conveyance with the tenant in fail.

The cases (*d*), however, seem to warrant a decided opinion, that a *joint conveyance* by two persons, having distinct estates, will pass those estates, as a conveyance of the one estate, and confirmation of the other, without occasioning any merger of the par-
[108] ticular estate. Although the two estates are blended, the grantee will hold under the title of the owner of the particular estate, during the continuance of that estate; and after the determination of that estate, he will hold under the title of the person in remainder or reversion. Thus there is not any *merger*. This subject will be fully discusssd in the long promised Essay, on the doctrine of Law respecting the *Merger of Estates*.

To avoid all doubts on the extinguishment of the particular estate, the conveyance may be confined to the joint lives of the freeholder and tenant, or tenant and vouchee; so as to leave a reversion, in other

(*d*) *Bredon's* case, 1 Co. 76. *Treport's* case, 6 Co. 14.

words, an intermediate estate, in the owner of the freehold.

This mode of limitation will effectually guard against the merger of the estate of freehold. It will also in the most effectual manner guard against the destruction of all powers, &c.—They will remain annexed to the reversion. And even though it should be doubtful whether the freehold be in the supposed tenant for life, or in some other person, both may safely join in the conveyance, with the precaution of confining the limitation to the joint lives of the tenant and vouchee, or to any other like period, which would indisputably create a particular estate, derived out of the estates of the conveying parties.

The lives of the tenant and vouchee are [109] most proper to be inserted in this instance. There will be a protection against the accident of the death of the supposed tenant for life, and the consequent determination of the estate of the tenant to the writ of entry, when that estate is circumscribed by the life of the supposed tenant for life.

In a recovery deed adapted to these circumstances, there should be a declaration, that the recovery shall enure to the use of the former owner of the life-estate for his life, in confirmation of, and for the purpose

of establishing his estate for life, and all powers, &c. annexed to that estate. The form of such a recovery deed will be found in the *Appendix*, p. 444, 456, 461.

Formerly the practice (introduced, it is believed, by Mr. *Booth*,) was, for the tenant for life, to convey to the intended tenant to the writ of entry for the life of the tenant for life; subject to a proviso, that unless 100,000*l.* should be paid on a given day, (namely, a day after the time within which the recovery was to be suffered,) the use should cease. This is called the *one hundred thousand pound clause*. It is founded on two principles. 1st, That it is sufficient that there should be a tenant at the time when a recovery is suffered, without any regard to a subsequent defeasance or avoidance of his estate. And 2dly, That unless
[110] 100,000*l.* should be paid on the appointed day, and which it is intended should not, and from the magnitude of the sum compared with the value of the estate, it is certain will not be paid, the title under this limitation will cease, or may be avoided.

The common recovery may devest the freehold and the reversion, &c. (*e*), till they are revived by re-entry, or by the new uses:

(*e*) Co. Litt. 356. a. 362. a.

and uses ought to be declared to revive the seisin. A form of this clause is in the *Appendix*, p. 480.

Cautions when it is doubtful, whether a Person who intends to suffer a Recovery has an Estate for Life or in Tail, or when there are, or are supposed to be, contingent Remainders, to be preserved. [111]

Sometimes it is doubtful whether the person about to suffer a recovery is tenant for life, or tenant in tail. Supposing him to be merely tenant for life, and no tenant in tail to join with him, his recovery would be a forfeiture of his estate. (*f*)

To protect against the consequence of forfeiture, and secure the enjoyment for a period of years, if the owner should so long live, a term is generally created by demise, and vested in a trustee for the owner :—and a form of a demise for this purpose will be found in the *Appendix*, p. 468, 472, 475.

According to *Pelham's* case (*f*) there will be a forfeiture by suffering a recovery, even although the tenant for life has a remote estate of inheritance. But from the decision in *Smith* v. *Clifford* (*f*) it may be collected, that when the tenant for life has a remote

(*f*) *Pelham's* case, 1 Co. 14. b. *Smith* v. *Clifford*, 1 Term Rep. 738.

estate of inheritance, or the owner of a remote estate of inheritance joins in the recovery, no forfeiture will be incurred.
[112] This point may deserve further consideration: it does not seem to be fully decided.

Sometimes also it is doubtful whether the person who is to suffer the recovery is tenant in tail, or merely tenant for life, with contingent remainders in favour of his children; and on the one hand he is desirous of barring the estate-tail if he has any; and on the other hand, it is his wish, if he is merely tenant for life, to preserve the contingent remainders to his children. Without some precaution to preserve the contingent remainders, they would be destroyed by the recovery, unless, (as sometimes happens,) there be an interposed estate of freehold in trustees for their preservation, or in some other person who continued his ownership.

To guard against the destruction of the contingent remainders, either the land should be conveyed to the use of the intended tenant during *the joint lives* of himself and the tenant for life or in tail, being the intended vouchee; with remainder to the use of a trustee, for the life of the vouchee, in trust for the vouchee and his assigns; remainder to the vouchee in fee; with a suitable de-

claration of the uses of the recovery. See *Appendix*, p. 336.

Or the lands should be conveyed by the supposed tenant in tail, to A. for the life of the supposed tenant in tail; to the use of the supposed tenant in tail, during the joint lives of himself and the intended tenant to the writ of entry, with remainder to the use [113] of A. for the life of the supposed tenant in tail, in trust for him and his assigns: afterwards, by a distinct deed, *the supposed tenant in tail*, who by these means will retain the freehold under the limitation to his use during the joint lives, should convey to the tenant to the writ of entry, for the purpose of suffering the recovery. See *Appendix*, p. 332, 338.

Of these modes the latter is preferable; no question is raised on the title, on the face of the recovery deed. Either of the forms is sufficient for the purpose. In each instance the freehold will be effectually vested in the intended tenant to the writ of entry; and the estate limited to the trustee in trust for the supposed tenant in tail, will protect the contingent remainders from destruction. And either form, when adopted, will supersede the necessity of a demise for years. The estate in the trustee will be a protection from the consequence of a forfeiture, and also vest in him the power of

taking advantage of the forfeiture, for the benefit of his *cestui que trust.*

In cases of this sort, no express declaration should be added, for supporting contingent remainders, unless the party means to preclude himself from destroying them at a subsequent period.

[114] The like or some such precaution is necessary, when A. is tenant for life, with a contingent remainder in tail to himself or his children, with remainder over in tail ; and the tenant for life is willing to assist the owner of the remote remainder in tail, in suffering a common recovery, so as to enlarge his estate-tail into a fee-simple; and is at the same time anxious, (as he ought to be,) to retain an estate of freehold for the purpose of preserving the contingent remainders depending on, and supported by, his estate. A limitation, during the joint lives of the tenant for life, and of the tenant in the recovery, or of the tenant in the recovery and of the vouchee, so that the tenant for life retains his estate for life, by way of reversion, will be sufficient for these purposes.

The form of a recovery deed adapted to these purposes will be found in the *Appendix*.

There are some particular cases, in which other cautions, besides those already suggested, will be necessary.

For example, suppose A. and B. to be

seised for the life of C. in trust for her, with contingent remainders to the children of C., for life; with a limitation over, which leaves it in doubt whether C. has not an estate-tail in remainder: and suppose the reversion in fee to be in A.: and the parties are anxious to preserve the contingent remainders from destruction, and also to give the children estates-tail, on certain contingencies. To accomplish all these objects, a recovery must be suffered, or a fine be levied. This is ob- [115]
vious. Preference being given to a recovery, it follows that the trustees must join to pass the freehold. C. must be vouched to bar the estate-tail, if any. A. must also convey his inheritance, to guard against the doubt, whether C. has, or has not, an estate-tail. Although, by a conveyance from A. B. and C. jointly, to D. in fee, the estate for life of A. and B. would not be merged; yet there is reason to apprehend the union of the estate of freehold, with the inheritance, would be a destruction, at law, of the contingent remainders, and thus one of the objects would be defeated.

To obviate this objection, this plan may be adopted. A. B. and C. should convey to D., (the intended tenant,) for the life of C.: to the use of D. during the joint lives of himself and C., with remainder to the uses afterwards declared. It should then be expressed

that the limitation made to the use of D. during the joint lives, &c. is to the intent that a common recovery may be suffered. The recovery should be suffered,—and by the recovery deed declared to enure to the use of A. and B. during the life of C.; and the intention having required that the fee should be limited to A. and B. as trus-
[116] tees, the next limitation should be to the use of E. for the life of C., to protect, and preserve from destruction, the contingent remainders limited by the will of, &c.; remainder to the children of C. for such estate, &c. to which they are entitled under the will, &c. with remainder to the use of A. and B. in fee.

By this arrangement, the trustees will retain their particular estate, free, under their own conveyance, from all question of merger. The interposed state of E. will protect the original estate for life, from merger, by reason of the fee, if any passes, from C.

To make the inheritance of A. subject to these uses, and still to guard against the question of merger of the particular estate, is another object still to be attained. To effectuate this object, A. and C. may by another conveyance in the same deed, grant to F. in fee, to the uses afterwards declared; that is to say, to the use of E. for the life

of C., upon the trusts previously declared of his estate ; and after the determination of that estate, to the uses declared of the recovery, in remainder after, and expectant on, the determination of the estate of E. By the conveyance to F. instead of D., and by passing over the limitation to the use of A. and B. for the life of C., there will not, at any time, be an union of the inheritance with the particular estate of A. and B., so as to raise the question of merger, as a consequence of even a momentary consolidation of the estate of A. and B. during the life of C., with the inheritance of either [117]
C. or A. While, if the grant had been made to D., he would have had the freehold and inheritance, *simul et semel.* And if the use on the grant had been declared to A. and B., these persons would have had their old estate for the life of C., and another estate for the same period, derived out of the inheritance of C. and A. or one of them. Such circumstances would have raised the objection, that the original estate for life was merged in the accessional estate for life.

It remains to be observed, that these precautions are not absolutely necessary when the estate is merely equitable. The principles of tenure, inducing *forfeiture* for tortious alienations by particular tenants, do not apply to alienations by tenants of equi-

table estates. Nor are the precautions which have been recommended, necessary in suffering recoveries of lands of *copyhold tenure* for the purpose of barring intails of the customary tenure. Let it also be remembered, that contingent remainders of the equitable ownership, do not admit of destruction, by the alienation of the particular tenant. As equitable owners have not the same power, as the owners of legal estates, to devest or discontinue the remainder or reversion expectant on particular estates; neither the forfeiture of particular estates, nor the destruction of contingent remainders, forms a part of the system of tenures adopted by courts of equity. The analogy of the rules of law, under these circumstances, is not applicable, and therefore is not applied, to equitable estates.

[118] *On Voucher.*

The voucher is that part of the proceedings in a common recovery, by which a warranty is supposed, and in consequence of that warranty a person is vouched. The vouchee admits the warranty. He takes the defence on himself. Thus, as between the parties, he becomes the defendant; and the plaintiff counts against him, by stating the demand against him as tenant by the warranty, in like manner as he counted against the ori-

ginal defendant as *terre-tenant*, or actual freeholder. When the tenant vouches a person, who makes default, this is a recovery with *single voucher*. As often as this vouchee vouches another, who makes default, this is a recovery with *double voucher*. And when one person is vouched, who vouches another, who vouches a third person, this is a recovery with *treble voucher*. The consequence of voucher is *recompence*; in other words, judgment to recover in value.

In recoveries suffered to bar estates-tail, or remainders expectant on them, a voucher by the person who is the donee or heir in tail is essential. Without a voucher, the estate-tail, or the remainders expectant thereon, cannot be barred. Against the *issue in tail*, the voucher, and consequently recovery in value, in other words the recompense, or possible recompense, is the cause of the bar (*g*). The doctrine of recompense is not considered as essential to bar the remainder-men. Against them the common [119] recovery is treated as a common assurance (*h*). It follows that the issue cannot be barred, unless the recompense, on the voucher, will, in intendment of law, belong to them, in the same order of succession as their estate-tail, and as a substitution and equiva-

(*g*) Pigott on Recov. 31. Co. Litt. 373. a.

(*h*) Per Willes, 1 Wils. Rep. 73.

lent for that estate (*i*). The difference made in some cases, between a recovery with double, and a recovery with single voucher, arises out of this doctrine; and the doubt whether a treble voucher is not necessary under some circumstances, owes its origin to the same learning. It is agreed that a recovery suffered by tenant in tail, by his own default, or by confession, will not bar the estate-tail. It is not only necessary that there should be a voucher, but it is also material to the recovery, and essential to its operation against the issue and persons in remainder, that the tenant in tail should vouch some person to warranty, and have judgment to recover in value: that there may be a *recompense*, to descend in *the same line* as the estate-tail would have descended (*k*).

To *convey* an estate, or to operate by *estoppel*, a voucher is not essential. If there be a voucher, it is not necessary that there
[120] should be a voucher over, so as to give title to a recompense in value.

From these deductions it will always be necessary to distinguish, whether the recovery is to operate simply as a conveyance; as a release of right; or as an estoppel; or is to be considered as the assurance

(*i*) *Taltarum's* case, 12 Ed. IV. 14, 19. (*k*) Co. Litt. 373. a.

of tenant in tail, to bar his issue and those who have a reversion or remainder expectant on his estate.

A common recovery may, at the same time, have two objects: one to bar an estate-tail, &c.;—the other to pass an estate, as the jointure of a married woman; or bar a right, as a title of dower; or extinguish a collateral interest, as a rent-charge: and though the recovery may be void against the issue, for want of regular voucher, it may be good as a conveyance, or release, &c. The recovery may also and at the same time be good, against the estate-tail, &c. and operate as a conveyance, release, &c. though the recompense is carried over wholly to the estate-tail; and of consequence no benefit from the voucher, is derived by any other person who has an estate, the right or title, or the collateral interest (*l*).

In this place it may be called to mind, that the law uniformly carries the recompense, derived from a recovery in value, to the persons by whom the loss is sustained. For example, if two persons are vouched [121] jointly, and one of them has nothing, the recompense will belong to the person by whom the loss is sustained (*m*).

(*l*) *Eare* v. *Snow*, Plowd, 514. Pigott on Recov. 14.

(*m*) *Page* v. *Hayward*, 2 Salk. 570. Pigott on Recov. 176. Co. Litt. 376, b.

And when the lands recovered were intailed, the lands recovered as the recompense in value, will be considered as intailed in the same manner, as the lands of which the recovery is suffered. (*n*)

In common recoveries this recompense is merely nominal. The judgment to recover in value is mere form : a form, however, to be observed, that a common recovery may have the semblance of a recovery in an adverse action.

(*n*) Co. Litt. 252, a. Plow. Com. 514, and *Manxel's* case, at the end of Plow. p. 8.

OF THE VOUCHEES.

COMMON RECOVERIES ARE WITH

I. *Single Voucher.*
II. *Double Voucher.*
III. *Treble Voucher.*

I. *Of Recoveries with Single Voucher.*

A recovery with single voucher is in modern practice very rarely used. The only instance in which it has been used for many years, is that which is to be found in Mr. *Fearne's Posthumous Works* (*o*).

In this recovery the writ is brought against the tenant in tail himself, as a tenant of the freehold: and the recovery will be effectual to bar the estate-tail, only in the particular instance in which the tenant is actually seised of an estate-tail, conferring the right to the *immediate freehold*, in other words, an *estate-tail in possession* (*p*).

Any estate-tail which is devested or dis-

(*o*) P. 336.

(*p*) *Taltarum's* case, 12 Ed. IV. 14, 19.

continued will not be barred (*q*). Nor will the recovery bar any estate-tail which has been previously aliened (*r*), although the party takes back an estate-tail, unless it be the same estate-tail, upon his conveyance (*q*). Nor will the recovery bar any estate-tail, in remainder or reversion, after and expectant on an estate of freehold, though the freehold, as a distinct estate, be in the tenant in tail himself (*s*), or though it be in a different person, and both these persons are named tenants (*t*).

For these reasons a decided preference is due, and, in practice, is given to recoveries with double or treble voucher.

Suppose A. tenant in tail in possession: and he discontinues, or even conveys, and takes back another estate-tail, and suffers a recovery, in which he is named tenant, and vouches over, this recovery will bar the estate-tail taken under the discontinuance or conveyance; but the right under the original estate-tail will not be barred. The very point was decided in *Taltarum's* case, already cited. So that the same issue may
[124] be barred as to one estate-tail, and their

(*q*) *Taltarum's* case, already cited.

(*r*) *Lin. Coll.* ca. 3 Co. 58. *Peck* v. *Channell*, Cro. Eliz. 827.

(*s*) *Meredyth* v. *Leslie*, 6 Bro. Par. Cas. 209. *Owen* v. *Morgan*, 3 Co. 5. *Clithero* v. *Franklin*, 2 Salk. 568.

(*t*) Pigott on Recov. 35. 3 Co. 6, b.

right under another estate-tail may continue. To effect a bar under the original intail there must be a voucher of the donee in tail, or the heir to the intail, and a voucher over.

On the subject of recoveries with single voucher, the cases applicable to husband and wife must be called to recollection.

The following Points occur.

Husband makes a feoffment to the use of himself for life, remainder to the use of his wife for life, remainder to the use of the heirs of their bodies; and a præcipe is brought against him and his wife, and they vouch the common vouchee. This recovery does not bar the intail. The woman is not a proper tenant to the præcipe (*w*).

So if lands are given to husband and wife, and the heirs of the body of the husband, remainder over, and the husband alone suffer a recovery, in which he is tenant to the præcipe, and vouches the common vouchee, this recovery is not a bar to the issue or him in remainder. The recompense cannot enure to the estate. The wife having a joint estate, and no moiety between them, the husband is alone no good tenant to the præcipe. The estate tail and remainder [125]

(*w*) Pig. Rec. 35.

depended on the estate of husband and wife, as on an entire estate. (*x*).

It is otherwise of a *joint* estate conveyed to them before the coverture, for there one moiety is barred (*y*).

All these cases suppose the recovery to be defective, because the husband is named tenant, and the recovery in value cannot go immediately to the estate-tail, and in the same line of succession as the estate-tail. Had any other person been tenant, and the husband been vouched, and he had vouched over, the cases admit that the estate-tail would have been barred (*z*). These cases turn on a point of great nicety. The reasoning is incorrect, so far as the recovery is assumed to be defective for want of a *good tenant* to the writ of entry.

II. *Of Recoveries with double Voucher.*

In recoveries with double voucher, the donee or heir in tail, instead of being named tenant to the writ of entry, is vouched. Hence the necessity, in most cases, of a
[126] previous conveyance, for the purpose of making a tenant to the writ of entry.

(*x*) *Owen and Morgan's* Ca. 3 Co. 5.
Pigott on Recov. 38.

(*y*) *Marquis of Winchester's* case, 3 Co. 1.

(*z*) *Cuppledike's* case, 3 Co. 5. b.
Fitzwilliam's case, 6 Co. 32.
Hellet v. *Saunders*, 3 Lev. 107.

A person who comes in as a vouchee, on a common recovery, comes in of all estates-tail of which he is, or of which he ever was seised: or, with the exception of contingent or future interests, which he has in point of right or title(*a*). This is a general rule of law, and an universally acknowledged principle.

Thus a recovery in which the tenant in tail is vouched, and is vouched over, will bar an estate-tail, of which he is actually seised: it will also bar all intails, under estates which have been devested, discontinued, or previously aliened. Several estates-tail, or the right to several estates-tail, by one and the same operation may also be barred (*b*).

All remainders and reversions expectant on the intail, even though the estate-tail has been previously barred by a fine with proclamations levied by the tenant in tail, are within the influence and barred by the operation of the recovery (*c*). And the better, and at this day the generally received opinion is, that a recovery suffered by the heir in tail after the death of the ancestor, and after a fine with proclamations levied by the ancestor, which has effectually barred the

(*a*) Salk. 571. Brook. Tail. Plea. 32.

(*b*) *Sheffield* v. *Ratcliffe*, 2 Roll. Rep. 418. *Manxel's* case at the end of Plow. p. 8.

(*c*) *Barton* v. *Lever*, Cro. Eliz. 388. 1 Vez. 253.

[127] intail, will bar all remainders and reversions, which are, or were expectant on the estate-tail (*d*).

III. *Of Recoveries with treble Voucher.*

Recoveries sometimes, though not frequently, are suffered with treble voucher.

The only possible case, in which a recovery with these vouchers can be necessary is, in the instance in which tenant in tail creates an estate-tail, derived out of his own estate-tail; and the two intails are, in point of estate or of right, existing, at one time, in *distinct persons*, and both intails are to be barred.

In this instance, the owner of the derivative estate-tail should be first vouched, —he should vouch the owner of the original estate-tail,—and that vouchee should vouch the common vouchee: not, however, that the order of the vouchers is essential, except as a matter of form; for, upon principle, it is clear that if each tenant in tail be distinctly vouched, and vouch over, his intail will be barred, although he should be vouched out of the order which is recommended.

By the statute law there cannot in some actions be a voucher out of the degrees;

(*d*) Fearne's Posthumous Works, 442.

but in the writ of entry in the post , on which common recoveries are grounded, there may be a voucher at large. See *Booth on Real Actions*, 175 ;—and hence the preference given to recoveries on a writ of entry, in the post.

A difference of opinion exists among con- [128]
veyancers, whether a recovery with treble voucher be in any case necessary. Few admit the necessity of vouching the two tenants in tail distinctly. The majority, relying on *Page and Hayward* (*e*), are of opinion, it is sufficient that both tenants in tail shall be vouched jointly.

The objection against this mode of vouching is, that the recompense cannot go to the issue of both tenants in tail ; and that the analogy to real adverse actions, in which recompense is the foundation of the bar, is sacrificed. On this point see *Watkins's Principles*, p. 134. *Co. Litt.* 102, (a), and 376, (a & b). *Plowden's* argument in the case of *Bassett and Morgan* v. *Manxel*, published at the end of his Reports.

In all other cases, it is conceded, the voucher of a tenant in tail, jointly with another person, will be effectual to bar the estate-tail (*f*).

The decision which established that point

(*e*) 2 Salk. 570.

(*f*) *Eare* v. *Snow*, Plow. 514. Co. Litt, 376.b.

proceeded on the ground, that the recompense will go according to the title of the persons by whom the recovery is suffered.

However, this is not a decisive answer to the objection, which assumes the necessity of a treble voucher: because in the case of
[129] an estate-tail derived out of an estate-tail, it is impossible that the same recompense should, consistently with the principles of law, be a recompense to both classes of issue. It is absurd to suppose that the issue under the derivative estate-tail, are, in the first place, to recover the recompense, as upon a defeasible title, and that the issue under the original estate-tail may recover the recompense from them (*g*).

This mode, indeed, of compensating them is a solecism, and impracticable in any legal mode, known to the rules of law. The issue under the original estate-tail, if they can recover the recompense in any mode, must recover it for their own benefit, against the person whom they or their ancestors vouch.

Nor is it possible that the recompense can be divided between the different classes of issue, to be a compensation to all of them. The issue under the original estate-tail will not have a recompense to the extent of their title, unless they have other lands,

(*g*) See *Mary Portington's* case, 10 Co. 37.

equal to the full value of those originally intailed,

To put the case in the most striking point of view, the recovery may be supposed to be suffered by the tenants in tail themselves: so that the issue cannot derive their [130] title to the recompense, otherwise than through their ancestors, or under any other foundation than the judgment given upon the different vouchers. The case is thus disengaged from the supposition that the issue under the original estate-tail, are the only persons to be considered, in determining the title to the recompense. For as between the two tenants in tail themselves, it is clear that the owner of the derivative estate-tail has an exclusive right to the recompense.

The answer which an eminent and liberal gentleman, since dead, gave against the necessity of vouching the tenants in tail separately, was, that " had the vouchees " demanded a lien, that is, required the " tenant to show what he had to bind them " to the warranty, and what estate they " were bound to warrant, the recompense " could only have been according to the " estate to which the actual warranty was " annexed; but in consequence of their " entering into the warranty paramount, " the writ of *execution* of the land, recovered

" against the common vouchee, must be
" general, for delivery thereof to the first
" vouchees, without expressing for what
" estate; and it appears by the books,
" that though the vouchees themselves are,
" by entering into the voucher jointly,
" estopped from saying that they had not
[131]" a *joint* estate, their issue will not be
" estopped. The claims of both classes of
" issue are upon one estate, and an estate
" of equal value is awarded as a recom-
" pense for it, and will be subject to the
" same claims. After the death of their
" vouchees they must implead *one another*,
" and the recompense will go to those who
" shall be adjudged to have sustained the
" the loss; for if the issue are not estopped,
" no injury is done. The law remains
" open." The authorities relied on were Co. Litt. 101 (b), and 376, (a & b).—The case of *Page* v. *Hayward*, and *Plowden's* argument in the case of *Bassett and Morgan* v. *Manxel*, published at the end of his Reports.

Of the authorities cited, that which bears most on the argument is the passage in Co. Litt. 376, b. The example in that case is taken from *Eare and Snow's* case, in *Plowd.* Comm. 514. The language of Lord *Coke* is, " If tenant in general tail be, and a com-
" mon recovery is had against him and his

" wife, where his wife hath nothing, and
" they vouch, and have judgment to reco-
" ver in value, tenant in tail dieth, and the
" wife surviveth ; for that the issue in tail
" had the whole loss, the recompense shall
" enure wholly to him ; and the wife, albeit
" she was party to the judgment, shall have
" nothing in the recompense, for that she[132]
" loseth nothing."

This observation does not relieve the case under consideration from its difficulties. In Lord *Coke's* case there was only one estate-tail, and there was one recompense sufficient to compensate it. In the case under consideration, there were two estates-tail, and only one compensation. The issue claiming under one of the estates-tail must be disappointed. Each of them cannot have the recompense in value. For if it should be given to the issue claiming under the derivative estate-tail, the issue under the original estate-tail would be bound, without any equivalent. On the other hand, in case the recompense in value should be given to the issue under the original estate-tail, the issue under the derivative estate-tail would be bound without having any recompense. As between the two classes of issue, no doubt the issue under the original estate-tail ought to be preferred,

and they certainly would be preferred whenever their title came in competition.

Many cases may be put in which the utmost confusion would arise from giving the recompense to the tenant of the original estate-tail or his issue, in exclusion of the tenant of the derivative estate-tail, and his
[133] issue. Should the recompense be given to the tenant under the derivative estate-tail, or his issue, what ground is there for treating the original estate-tail with the remainders expectant thereon, to be barred by the operation of the recovery? Suppose A., being tenant in tail, to make a settlement in favour of B. in tail, and a common recovery to be suffered, in which both shall be vouched jointly. To give the recompense to A. would be injurious to B., who as between A. and B. is the rightful owner. Or supposing A. after the settlement, to have levied a fine and barred his issue, and the issue and B. to be jointly vouched; what pretence is there for giving the recompense to the issue of A.? As between the issue and B. the title is in B. and not in the issue of A. In the latter case it might be contended that the recompense should go to B., and still that the recovery by the issue in tail would bar the remainders over expectant on his estate-tail, since the re-

mainders are barred without regard to the recompense in value. Though this may be an answer by way of estoppel, to the instance in which the issue are vouched, it cannot be an answer to the issue themselves, when the recovery is suffered with the voucher of their ancestor, and the recovery is produced as a bar to their claim. The books seem agreed that recompense in value is the only ground for barring the issue; but the remainders may be barred [134] without regard to the recompense, on the ground that the recovery is a common assurance.

It will now be proper to consider whether there are any grounds which render it prudent, at least, if not necessary, that a recovery with treble voucher should be suffered, in those instances in which there are two estates-tail to be barred, and one of these estates-tail is derived out of the other of them.

The old books, and, among them, Co. Litt. certainly placed the bar of the issue of tenant in tail on the ground of recompense; and if recompense be really (as in principle it is professed to be) the ground, on which recoveries bar the issue, it is obvious that two classes of issue, claiming in opposition to each other, cannot have the benefit of one and the same recompense.

One class of issue must be disappointed; since both classes of issue do not claim under one and the same title, in the line and course of remainder; allowing the recompense may be enjoyed first by the issue of one tenant in tail, and afterwards, and by way of remainder, by the issue of the other tenant in tail.

The doctrine advanced in *Page* v. *Hayward* does not bear on this point. The greater part, if not all, the learning in that case is warranted by former determinations. Nor can it be denied, that when a tenant
[135] in tail is vouched, and vouches over, he comes in in privity of all the estates he ever had. And though a stranger be joined with him, the recompense will belong to the tenant in tail, exclusively of the stranger. And when tenant in tail and the owner of a remainder in tail, are vouched jointly, there is no doubt of the efficacy of the recovery. The voucher of the first tenant in tail alone would have barred the remainder in tail. The distinguishing circumstances of this case are:

First. When one estate-tail is derived out of another, the issue under the original estate-tail will claim in exclusion of, *and not in subordination* to, the owner of the derivative estate-tail; and

Secondly. The issue under the original

estate-tail are not strangers, nor are the issue of the derivative estate-tail to be considered in that light, till the gift creating their estate-tail is avoided. Instead of denying the necessity of distinct vouchers, Lord *Holt* approved of them, as more regular. At the same time, under the particular circumstances of the case of *Page* and *Hayward*, he considered the voucher of the tenant in tail, jointly with another person, sufficient to bar the intail.

The most diligent search has not produced any authority, in which it has been asserted or denied, that a recovery with treble voucher is necessary, in a case like that [136] under consideration, or in any case whatever. But ever since *Page* and *Hayward*, recoveries with treble vouchers have been occasionally used; and Mr. *Pigott*, in p. 26, if properly understood, does in cases in which one estate-tail is, or may be supposed to be, derived out of another estate-tail, recommend a treble voucher. Though he puts the case generally of a tenant for life, with remainder to his son in tail, he must have had in his contemplation an ancient family-estate, in which the tenant for life might have a dormant intail. When the observations of Lord *Holt*, in *Page* and *Hayward*, as reported in *Pigott*, pages 191, 192, 193, 194, are taken with their context;

and the sense of the words "*in this manner*" are attentively weighed, that distinguished lawyer is recommending the several and *distinct vouchers of different persons of the family*. And it would have been nugatory, on the part of Mr. *Pigott*, to have advised a treble voucher, if a voucher of the father and son jointly would have answered every purpose. See also *Cruise on Recoveries*, 219. Mr. Justice *Blackstone* in the 2d vol. of his Commentaries, p. 359, certainly supposed, that the exigency of the case might require a treble voucher. Such voucher cannot be requisite in any case, unless it be requisite in a case attended with
[137] the circumstances now under discussion. Though for the purpose of supporting recoveries as common assurances, the court may determine that both intails will be barred by a joint voucher, of several tenants in tail, even when one of two estates-tail is derived out of another; in the same manner as a recovery on the voucher of a tenant in tail, who has several estates-tail, or the right of different intails, in the same land under different titles (*h*), will bar all the intails; yet the law on the point cannot be safely acted upon, or considered as clear, till it shall have received the determination of a court of competent jurisdiction, and the

(*h*) Supra, 126.

question shall be decided by that determination.

By what Tenants in Tail a Recovery may be suffered with Effect; and to what Extent in Point of Share.

First. It is now to be considered by what tenants in tail a common recovery may be suffered, so as to bar the estate-tail, and the remainders and reversions expectant thereon. In this division, which, in a great measure, is a summary, or review, of points already noticed, it is impossible to avoid the appearance of repetition.

A recovery is *peculiarly* the assurance by which a tenant in tail may *enlarge*, or, more properly speaking, convert, his estate-tail into a fee, by barring the estate-tail, and all remainders and reversions expectant on that estate. Under such recovery there will be acquired an ownership, co-extensive with that of the person by whom the estate-tail was created. *Cæteris paribus*, namely, with the concurrence of the freeholder, a recovery my be suffered with effect, either by the tenant of an estate-tail in possession, or of an estate-tail in remainder or reversion (*i*) or by the person on whom an estate already

(*i*) Supra, 16, and 2 R. Ab. 394, l. 10.

alienated, devested, or discontinued, was
[139] entailed (*j*), and even by the issue in tail, although the estate-tail has been previously barred, by a fine with proclamations levied by their ancestor (*k*): or as a consequence and deduction from the same principles, by the statute of limitations, or warranty, &c.

But, as has already been observed, no one except *a tenant of an estate-tail in possession* can suffer with effect a common recovery with *single* voucher; and then a recovery so suffered will only bar this particular estate-tail, and the remainders, &c. expectant on that estate. A person who has a remote estate-tail may, by merger, surrender, &c. of the estate for life, or even disseisin (*l*) of tenant for life, when the estate-tail is *immediately expectant* on the estate for life, become tenant in tail in possession. But in *Lincoln College Case* (*m*) it was assumed that the disseisor could not suffer an effectual recovery as *tenant* of the freehold. The ground of the point, as found in *Rolle's Abridgment*, is, that the owner of the first estate of inheritance does not, by the disseisin of the tenant for life, devest the remainder in tail,

(*j*) *Manxel's* case at the end of Plow. page 8.
Sheffield v. *Ratcliffe*, Hob. 334.
Lincoln College case, 3 Co. 58. b.

(*k*) Supra, 126, and Hob. 259.

(*l*) 2 R. Ab. 5. 395.

(*m*) 3 Co. 58. b.

or put it to a right. He is merely a disseisor to the extent of the estate for life, and then by the union of the two estates the remainder in tail becomes an estate-tail in possession. And it is material to this purpose that a stranger may, by claiming the estate of a tenant for life, disseise that tenant and acquire the freehold, without disseising the remainder-man or reversioner, or devesting his estate.

The *alienee* of a tenant in tail, or the *assignee* of the crown, claiming the estate of a tenant in tail under an attainder for treason (*n*): cannot, in any case, bar the estate-tail or the remainders by suffering a common recovery.

The privilege of suffering a *recovery* is given to the tenant in tail and his issue, and is *personal* to them.

And a corruption of the inheritable blood of the *issue*, by the attainder of their ancestor for *treason* (*o*), will preclude their right [140] to suffer a common recovery. After such attainder they cannot bar the remainders. By the corruption of the inheritable blood, the issue are strangers. They forfeit the character of heirs in tail. They are incapacitated to take any benefit under the intail, though the estate continues by reason of the continuance of issue (*p*).

(*n*) Supra, 4.
(*o*) Jenk. Cent. 251.
(*p*) Hob. 345.

And *attainder* of tenant in tail creates a disability (*q*) to suffer a common recovery. He is *civiliter mortuus*. Between the crime and attainder, it should, from analogy, seem, that a common recovery may be suffered (*r*).

A recovery suffered by an *alien*, who is tenant in tail, will bar the remainders expectant on his estate (*s*). He is tenant in tail till office found, and as tenant in tail he has all the powers exerciseable in respect of that estate. It is for the benefit of the crown only, and not of remainder-men, that there is any disqualification.

When the intail is of a subject which has a limited duration, as a rent-charge, created *de novo*, and limited for an estate-tail, without any remainders over, then, as already observed, the recovery of tenant in tail cannot enlarge the estate beyond the period prescribed for its duration (*t*).

And, it is apprehended that when an estate-tail *in lands* is derived out of a qualified or determinable fee, the recovery cannot do more than acquire the ownership for the time of that determinable or qualified fee (*u*).

In short, the fee acquired by means of the recovery of the tenant in tail, cannot,

(*q*) See Barton's case, 2 R. Ab. 394, l. 37. (13 Jac.) Jenk. Cent 250. 1 Keb. 398. cites *Barton and Bremer's* case, (37 & 38 Eliz.) as contra.

(*r*) *Stevens* v. *Winning*, 2 Wils. 219.

(*s*) 4 Leon. 84.

(*t*) Supra, 3.

(*u*) Supra, 2.

in any case, be larger than the ownership out of which the estate-tail is derived.

It is also observable, that when a tenant of a remote estate-tail suffers a common recovery, in which he is vouched, and vouches over, the effect of this recovery, even supposing it to be suffered *concurrentibus iis qui in jure requiruntur*, will be merely to bar his own estate-tail, and the remainders and reversions expectant thereon (*v*), and all conditions and collateral limitations annexed to his estate.

It will not affect *prior estates-tail* (*w*), or any other prior estates. On the contrary, the owner of a prior estate-tail may, afterwards, by suffering a common recovery, bar the fee, acquired through the medium of the recovery, suffered by the owner of a more remote estate-tail.

To these observations it may be added, that no tenant in tail can, by suffering a common recovery, bar any charges which are an incumbrance on his own estate, nor any estates derived out of his own etate-[142] tail. On the contrary, he may give confirmation and stability to these estates and charges, by suffering a common recovery (*x*).

(*v*) 3 Co. 6.
Smith v. *Clifford*, 1 T. Rep. 738.
Doe v. *Halley*, 8 T. Rep. 10. and su ra, 16.

(*w*) *Smith* v. *Clifford*, already cited.

(*x*) *Goodright* v. *Mead*, 3 Burr. 1703.
Stapilton v. *Stapilton*, 1 Atk. 2.
And supra, 16.

The person also by whom the recovery is suffered must be full and complete tenant in tail, either in point of vested interest, or of right to an estate which was once vested.

In the first place, the owner of a *contingent* or *executory* interest in tail, cannot, it is apprehended, by a common recovery, bar either his own interest, (except by way of estoppel) or the remainders, &c. expectant thereon: much less can the *issue in tail* (*y*) suffer a common recovery with effect in the life-time of the ancestor. Whether a *common recovery*, suffered by a person who has a contingent interest in tail, will be a bar to his issue, as well as to himself, is one of the many points which afford ground for doubt, from the absence of decision, and the opportunity of adducing conflicting principles, leaving it in uncertainty which of them shall prevail. The opinion formed by the author is, that an estoppel, though binding on the ancestor, would not bind the heir in tail. The general rule is that the heirs in tail are not bound by estoppels.

At the same time, it is observable, that recovery suffered by tenant in tail, will bar contingent remainders expectant on his estate, and also terms of years, &c.

(*y*) *Apprise* v. *Apprise*, *Anderson* 41. Vin. Abr. *Recovery Common*, M. pl. 1.

The owner of a contingent interest should be very cautious how he suffers a recovery or levies a fine, which may extinguish, even as against himself, the contingent interest in tail. It will prevent the vesting of the estate, and as against himself at least, when there is a recovery, and as against himself and his issue, when there is a fine with pro- [143]
clamations, preclude the right of suffering a recovery, when the estate, unless extinguished, would have become vested. This is understood to be a new point.

Secondly. A recovery will be good only for that portion of estate which does or did belong to the tenant in tail who is vouched.

Thus when several persons are tenants in common, or joint tenants in tail, and one of them is vouched, the recovery will be good only for his share; or if several are vouched, the recovery will be good only for their respective shares.

When a sole heir in tail suffers a recovery, and the share is abridged by the birth of a co-heir, it should seem that the recovery would be void for the share of the co-heir. And that a recovery by an heir in tail, whose estate is defeated by the birth of a more immediate heir, would be avoided by the avoidance of the descent. On recoveries suffered by a person who has a sole seisin, which is afterwards subdivided

among other persons, taking as joint-tenants or tenants in common, the appropriate observations will be found in a former page (*z*).

As often as husband and wife are tenants in tail by intireties, neither of them alone in the life-time of the other of them, can, by a common recovery, bar the estate-tail (*a*), so as to prejudice the other of them, or bar the issue in tail, or those in remainder or reversion. In these and many other particulars, there is a difference between the operation of a fine and recovery (*b*). But when husband and wife are tenant in tail by moieties, in other words, have an estate to them and the heirs of their bodies before their marriage, either of them alone before the marriage, or the husband alone, during
[144] the coverture, may, by a common recovery duly suffered, bar the estate-tail, in his or her aliquot part (*c*).

And though the husband who suffered a common recovery during the life of his wife, should survive her, that circumstance will not give validity to the recovery (*d*). A common recovery, however, suffered by one of the parents after the death of the other of them, except so far as a wife is restrain-

(*z*) Supra, 52.
(*a*) *Owen & Morgan's case*, 3 Co. 5. Shep. Touch 45.
(*b*) *Beaumont's case*, 9 Co. 139. Hob. 257.
(*c*) Supra, 125.
(*d*) 3 Co. 5, b.

ed from suffering a recovery of lands intailed on her by the provision of her husband, or of his friends, will be effectual. With such exception, the right and power of alienation are in the surviving parent.

An alienation made by the husband alone during the coverture, and defective on that account, would be confirmed and rendered complete, by his being duly vouched, and vouching over, in a common recovery suffered after the death of his wife.

And in this place it is to be observed, the recovery, to be good for a particular share, must be with the concurrence of the person in whom the freehold of that *identical* share resides.

Thirdly. A tenant in *tail after possibility of issue extinct,* has no longer the power of barring the estate-tail, or the remainders expectant thereon.

For all the purposes of alienation, he is considered merely as tenant for life (*e*). His estate must necessarily determine with his death. And if he forego the right of suffering a common recovery, while completely tenant in tail, that right cannot be exercised, when he is reduced to the situation of tenant in tail after possibility of issue extinct.

(*e*) Co. Litt. 28. a. 11 Co. 80.

At the common law, every tenant in tail had the power and the right of suffering a common recovery. This right is so inseparably annexed to his estate, that it cannot be restrained by condition, limitation, custom, or the like (*f*)

The statute law has introduced two exceptions, of which some notice has already been taken.

The first exception is applicable to tenants in tail of *the gift of the crown* for services performed, and in which the reversion or remainder remains in the crown (*g*).

To bring a case within this exception, there must be,

First, An estate-tail.

Secondly, It must be of the gift of the *crown*, namely, the king for the time being, while king; or by the purchase, or provision of the crown (*h*).

Thirdly, It must be for services performed (*i*); and at least, when the grant proceeds from a subject, the consideration, &c. must appear on record (*k*).

Lord *Mansfield* has advanced the doctrine, that in case of a gift by the crown,

(*f*) Co. Litt. 224. a. & Butl. n. 1.
Knowles's Argument in *Taylor* v. *Horde*, 1 Burr. 83-4.
(*g*) 34 H. 8. c. 20. Supra, 18.
(*h*) Co. Litt. 372. b. & 2 Co. 15. b.
(*i*) *Perkins* v. *Sewell*, 1 Bl. Rep. 654. 4 Burr. 2223.
(*k*) Co. Litt. 372. b.

the services must, at a distance of time, be presumed, and need not be proved (*l*).

Fourthly, The remainder or reversion in fee or in tail (*m*), must be in the crown. The restraint on the alienation continues so long only as the remainder or reversion remains in the crown. An alienation by the crown, of the reversion or remainder, leaves the tenant in tail at liberty to bar the estate-tail, and the reversion and remainder (*n*). While the estate-tail is protected from being barred, all other subsequent estates in other persons, are also protected (*o*): for unless the estate-tail can be barred, no other estate admits of being barred. But an estate-tail of the gift of the crown, though it cannot be barred, either by fine or com-[146]
mon recovery, while the reversion or remainder remains in the crown, may be barred by non-claim on a fine, or by collateral warranty, so as the tenant in tail is not a party or privy (*p*). But it is doubted whether any issue is barred for more than his *own time.* Perhaps each succeeding issue may have a new five years against a fine.—Lord *Nottingham* seems to assume that the bar will be only against the tenant

(*l*) *Perkins* v. *Sewell,* 1 Bl. Rep. 654.
(*m*) Co. Litt. 372. b.
(*n*) Ibid.
(*o*) Co. Litt. 372, b.
(*p*) *Stratford* v. *Dover,* Co. Litt. 373.
Lord *Nottingham's* MS. note, ibid. n. 2.

in tail at the time of the fine levied —Let it be admitted that the fine operates as against him, and it will follow, that it will operate as against each succeeding issue, at least for his time.

The authorities afford no satisfactory conclusion on this interesting point. The *Earl of Derby's case* (*q*) is an authority, only, that the issue is not barred by the fine with proclamations of their ancestor, being the donee or tenant in tail.

It has already been observed, that even at the common law, a recovery by tenant in tail, will not bar a reversion or remainder in fee in the crown (*r*). The recovery will operate only to the extent of converting the estate-tail into a base or determinable fee, and barring the issue (*s*). It will even bar remainders in strangers (*t*); and also a remainder after an estate-tail in the king (*u*). No estate is protected by the common law, from the operation of a recovery by tenant in tail, except a remainder or reversion in the crown (*v*).

The second exception applies to women tenants in tail, *ex provisione viri*. (*w*)

(*q*) 2 Show. 104.
(*r*) Supra, 19.
(*s*) *Neale* v. *Wilding*, 1 Wils. 275. Bro. *Assurance*, pl. 6.
(*t*) 2 Roll's Abr. 394. l. 1. Bendloes, pl. 254.
(*u*) 2 Roll's Abr. 394. l. 5. *Sir Hugh Chomley's* case, Moor, 342.
(*v*) Hob. 339.
(*w*) Supra, 19.

By the stat of 11 Hen. 7. c. 20, they are restrained from suffering recoveries, &c. either while sole, or under coverture with any after-taken husband; with the exception, that the act shall not extend to any [147] recovery to be had with the heirs next inheritable to the woman, or with the consent of the person next in remainder; provided such consent appear on the record, or be enrolled. To bring the case within the exception, the heir in tail or the person in remainder must be vouched, or their consent must appear by a deed inrolled.

This act equally extends to *equitable* and legal estates (*x*).

But this act does not extend to restrain a woman tenant in tail, *ex provisione viri*, from suffering a recovery jointly with her husband (*y*), or with the issue in tail (*z*), unless the title of such issue be defeated by the birth of a more immediate heir in tail (*a*).

Nor does it extend to lands settled by the wife (*b*), or given by any of her friends, or proceeding from the voluntary gift of a stranger (*c*); nor to lands settled on the

(*x*) *Clifton* v. *Jackson*, 2 Vern. 489.

(*y*) *Kirkman* v. *Thompson*, Cro. Jac. 474.

(*z*) *Mackwilliam's* case, Hob. 332. *Lincoln College* case, 3 Co. 59.

(*a*) 3 Co. 61, b.

(*b*) *Laughter* v. *Humphrey*, Cro. Eliz. 524.

(*c*) *Ward* v. *Walthew*, Cro. Jac. 173.

wife *in general tail,* with remainder to her in fee (*d*) ; nor when she is tenant in general tail, and the fee is limited to a stranger
[148] (*e*). In short, the restraint on alienation is merely for the benefit of the husband, his issue, or heirs.

Nor does this statute extend to copyhold lands (*f*).

[149] *Of the Necessity of a Seisin in the Demandant before any Uses can arise under the Recovery.*

To perfect the legal title under a common recovery, and to give a seisin to the demandant in the recovery, a writ of seisin (except in some particular cases, as where there is a reversion expectant on a term of years, and there is an entry or claim) must be sued and seisin delivered (*g*) ; and until such seisin is delivered, no uses can arise under the recovery (*h*). Till there is a writ of execution, and that writ is executed, there is not any seisin in the demandant, as the means of supplying a seisin to the uses : and until there is such seisin, the person claiming under the uses, hath no legal estate

(*d*) See 4 Co. 3, b.

(*e*) *Foster* v. *Pitfall,* Cro. Eliz. 2.

Hughes v. *Clubb,* Com. Rep. 309.

(*f*) *Harrington* v. *Smith,* 2 Siderf. 41, 73.

Gilb. Ten. 181.

(*g*) *Witham* v. *Lewis,* 1 Wils. 48.

4 Bro. P. C. 504.

(*h*) Mo. 141, in *Shelley's* case.

admitting of an alienation by him, by deed; but he hath an inchoate interest, which will allow of his devising the interest by will (*i*).

The true ground of *Selwyn* v. *Selwyn* is, that even before the recovery was suffered, the testator had in him a title to a future use, which gave him a power of testamentary alienation; and his will operated on this use in its fiduciary state, and also on the estate itself, when the use was executed by the statute for transferring uses into possession (*k*).

Another ground of that case, and the [150] ground to which it is more generally ascribed, is, that the recovery and recovery deed formed parts of the same assurance.

Regularly, in preparing *Abstracts of Title*, the time at which the writ of seisin is returnable, and also the day on which seisin is delivered, should be stated, for the purpose of ascertaining the time at which the title to the legal estate is complete: and also of ascertaining, that there existed at the time when a conveyance was made, by the persons claiming a title under these uses, a complete title to the legal estate.

It does not seem to be sufficient, that seisin should be delivered, unless the writ

(*i*) *Selwyn* v. *Selwyn*, 2 Burr. 1131.

(*k*) 27 H. 8. c. 10.

of seisin be returned; for the return is the only evidence that seisin was delivered.

But it is apprehended, that a conveyance made between the day on which seisin is delivered, and the day on which the writ of seisin is returned, would be operative and efficient. The sole use of the return of the writ of seisin, is to afford evidence of the fact of seisin.

[151] *Of certain Points relating to the Execution.*

If judgment be given in the life-time of the parties to the recovery, execution may be sued by or against the heir (*l*).

By the common law, the writ of execution and the return must have appeared on the record. Now, by the statute 14 Geo. II. c. 20, s. 4, the law has been remedied in this respect. In some cases, at least, the recovery deed is made evidence of the recovery, to supply any defect in entering the writ of seisin, &c. on record.

Hence the necessity, that the recovery deed should be full and explicit, in prescribing the mode in which the recovery is to be suffered. And care should be taken, that, in prescribing the mode of suffering the recovery, no error shall be committed.

(*l*) *Shelley's* case, 1 Co. 93.

The form in the *Appendix* may be safely followed. It will be found correct, not only in prescribing the mode of suffering the recovery, but in allowing a departure from some of the prescribed ceremonies, without deviating from the intention of the parties: so that should there be any thing to rebut the presumption arising from de- [152]
parture from the prescribed form, the alternate provisions may account for that departure, without raising any objection against the validity of the recovery.

Observations peculiarly applicable to Lands of [153]
Copyhold Tenure.

Copyholds may, under a custom for that purpose, be intailed (*m*). Unless there be a custom to intail, words of gift to a man and the heirs of his body, pass a *conditional* fee (*n*). This doctrine is strenuously combated by Mr. *Watkins* (*o*). When the legal estate does not admit of a direct intail, the rule is *Æquitas sequitur legem;* and as the property does not admit of an intail at law, it equally excludes an intail in equity; and the intention of the parties, however strongly expressed, cannot vary the law (*p*). Lord

(*m*) *Heydon's* case, Co. 8.
(*n*) *Pullen* v. *Middleton*, 9 Mod. 484.
3 Lev. 327, contra per Hale.
(*o*) Watk. Copyholds, 153.
(*p*) *Pullen* v *Middleton*, already cited.

Hardwicke expressly says, the trust estate of a copyhold can in no case be capable of an intail, where the legal estate is not, it being necessary that there should be the same rules concerning property in law and equity. Instead then of attempting to intail, through the medium of a trust, as recommended by Mr. *Watkins* (*q*), there should be such a trust, as is used to keep leasehold estates and chattel interests in the same channel as
[154] real estates which are intailed. When copyholds are intailed at law, the customary mode of barring the intail must be observed. This may be by surrender (*r*), customary recovery (*s*), forfeiture and regrant (*t*) ; and one of these modes may be concurrent with any other, or each of the others of them (*u*). For example, a custom to bar by surrender, may be concurrent with a custom to bar by recovery. And a surrender to the use of a will (*x*) may have the effect of barring the intail, as well as to accomplish the particular object in view. The right to bar an intail, is incident to, and a necessary atten-

(*q*) Watk. Copyholds, 159.

(*r*) *Everall* v. *Smalley*, 2 Str. 1197. 1 Wils. 26.

(*s*) *Dell* v. *Higden*, 4 Co. 23. a.

Dunn v. *Green*, 3 P. W. 10.

(*t*) *Grantham* v. *Copley*, et al. 2 Saund. 422.

Pilkington v. *Stanhope*, Siderf. 315.

(*u*) *Everall* v. *Smalley*, already cited.

(*x*) *White* v. *Thornburgh*, 2 Vern. 702.

Carr v. *Singer*, 2 Ves. 604.

Moore v. *Moore*, 2 Ves. 596. Amb. 279.

dant on a right to intail; and a custom to restrain the right to bar an intail is void (*y*). The object of the rule is to avoid perpetuities; and unless there be a custom pointing out a different mode, the intail may be barred by surrender (*z*). A customary recovery, suffered in the lords' court, is the more general, and it is the safe mode. It embraces, in common practice, the effect of a surrender; for at the end of the proceedings, at least, unless in an earlier stage of them, there will be a surrender by the vouchee, as well as by the demandant, tenant, and common vouchee. When a recovery is necessary, by the custom of the manor, it must have [155] the like forms as are observed in a recovery of lands of freehold tenure:—there must be a demandant, tenant, and vouchee, and voucher over; and the vouchers must be in like manner as if the lands were of freehold tenure. The recompense in value must be of lands within the same jurisdiction.

When the legal estate of copyhold lands may be intailed, the equitable ownership also admits of being intailed (*a*).

According to the earlier authorities (*b*), an equitable intail of copyhold lands may

(*y*) *Taylor* v. *Shaw*, Carter, 6. 22.

(*z*) *Moore* v. *Moore*, 2 Ves. 596. *Carr* v. *Singer*, ibid. 604. *Everall* v. *Smalley*, 2 Str. 1197. 1 Wils. 26.

(*a*) *Pullen* v. *Middleton*, 9 Mod. 484.

(*b*) 10 Vin. Abr. 266.

be barred, without the formalities of a customary recovery.

And *Lord Hardwicke* (c) has been understood to have laid it down as a general rule, that at least an equitable intail of copyhold lands may be barred by surrender.

In the following observations will be found the result of frequent consideration on this point, and a full examination of the authorities.

" It is quite clear that the trust or bene-
" ficial ownership of copyhold lands, intail-
" able at law, may be intailed in equity:
" and it is now settled, that the equitable
" intail of copyholds lands must, with the
[156]" exception, perhaps, (for the exception is
" not admitted,) of the case in which the
" equitable tenant in tail becomes the owner
" of the legal estate in fee, and the excep-
" tion of particular cases like *Otway* and
" *Hudson*, 2 Vern. 583, be barred by the
" same means, as the intail of the legal
" estate must be barred. When a common
" recovery is necessary to bar a legal intail,
" the practice has been to bar the equitable
" intail of copyhold lands by obtaining first
" a surrender to the *cestui que trust*, making
" him tenant in tail, and afterwards suffer-
" ing a customary recovery. But a reco-
" very may be suffered by the equitable

(c) *Radford* v. *Wilson*, 3 Atk. 815.

" tenant in tail, while he continues merely
" equitable tenant in tail, since a recovery
" by an equitable owner will have the same
" effect on the equitable ownership, as a
" common recovery, by the tenant in tail,
" of the legal estate, would have on the
" legal ownership. And with Mr. *Watkins*,
" in his excellent Treatise on Copyholds,
" p. 181, it is agreed, ' that it should seem
' a recovery suffered in the manor court of
' an equity in copyholds, is analogous to
' that relative to freehold property, and
' indeed that the same mode should be
' adopted for the barring of an equitable,
' as it would be necessary to pursue for the
' purpose of destroying a legal intail.'
" This doctrine is fully warranted by the
" opinion of Lord *Hardwicke* in the case of
" *Pullen* v. *Lord Middleton*, 9 Mod. 484, in
" which his lordship says, ' If the estates had [157]
' been intailed, it would have been necessary
' to have barred the intail by some proper
' means, either by a recovery suffered in the
' lords' court, if the custom of the manor
' admitted of it, or by a surrender; and
' though the intail had not been of the legal
' but of the trust estate, all possible endea-
' vours ought to have been used, to have
' barred it in the ordinary way; and the
' rules of the common law, in regard to the
' barring of such estates-tail, ought to have

'been pursued, as near as possible.' "His "lordship, in this part of the case, adverted "to *Otway* and *Hudson*, 2 Vern. 583, a "case depending entirely on the cir- "cumstance, that the tenant in tail had "done every thing in his power, for the "purpose of barring his equitable estate- "tail.

"The opinion also of Lord *Loughbo- rough*, in *Roe* v. *Lowe*, 1 H. Black. 461, in "answer to several cases which were cited, "to show that the equitable intail of copy- "hold lands may be barred by a mere "devise, was to this effect: 'Now though 'it is true that the devise of an equity in 'a copyhold, requires no surrender, yet 'that is, where the testator has a devisable 'estate; the intail *must first be barred;* the 'party must have done some antecedent 'act to enable him to devise; here no such 'thing was done, and the will of Thomas
[158] 'Weston Harper did not operate long; 'there was no length of possession against 'the intail, on which to presume a surren- 'der. But it is said that the intail was 'barred by the deed of the younger Thomas 'Weston Harper; but it would require a 'deal of argument to prove that a lease 'made by the equitable tenant in tail of a 'copyhold should be a bar of the intail. 'It is not clear then, that the estate-tail

'was *de facto* barred by any act of the 'tenant, if not, then Mary Weston Harper 'is intitled as heir in tail.'—

"To these authorities may be added, "the decisions in courts of equity as to "freehold lands. There a recovery is "considered, as absolutely necessary to "bar the equitable intail with remainders "over, although a contrary doctrine had "formerly prevailed in that court. See "Harvey *v.* Parker, 10 Vin. Abr. 266; and "Bridges *v.* Bridges, 3 Ves. jun. 120. The "observations of *Lord Alvanley*, then Mas-"ter of the Rolls, in the latter case, are "very apposite to this purpose. His lan-"guage was, 'This court has determined 'that such equitable estates are to be held 'perfectly distinct and separate from the 'legal estate; they are to be enjoyed in the 'same condition; intitled to all the same 'benefits of ownership; disposable, devi-'sable, and barrable, *exactly as if they were* 'estates executed in the party.'

"The observations of Lord *Hardwicke*, [159] "in *Radford* v. *Wilson*, (3 Atk. 815,) are, it "should seem, (and such indeed is the pre-"vailing opinion,) to be understood, as "perfectly consistent with his language in "*Pullen* v. *Middleton*. His observations "merely imply that an intail, legal, or "equitable, may be barred by surrender,

" when the custom of the manor does not " prescribe a different mode of barring the " intail.

" At all events the customary mode of " barring the intail of the legal estate of " copyholds lands, ought to be observed, in " barring the equitable intail of such lands: " and it would not in any case be safe to " adopt a different course of practice."

Lord Chief Justice *Bridgman* (*d*) seems to have decided, that an estate-tail in copyhold lands, may be barred by a fine, with proclamations, in the court of Common Pleas (*e*). On this determination it is to be remarked, that the lands (unless they are within a peculiar jurisdiction) are within the jurisdiction of the court of Common Pleas, though they are more properly impleadable in the lords' court, and in this respect they are under a different predicament from lands of the tenure of ancient demesne. This point is noticed, as a means of avoiding the
[160] rapacity of some lords of copyhold manors, who refuse to permit equitable owners to suffer a recovery, or pass a surrender, in the lords' court without being admitted, or at least paying fines as if they were admitted.

It is, however, to be observed, that some

(*d*) *Taylor* v. *Shaw*. Carter, 622.

(*e*) See also the observations of Lord Hardwicke in *Pullen* v. *Middleton*, 9 Mod. 484.

gentlemen, whose opinion is entitled to the highest respect, are not satisfied that a fine of copyhold lands will bar the trust of a married woman in those lands. Of course it is not safe, under the circumstances which have been noticed, to rely on a fine as a bar to an intail. Still it is very proper that the point should be kept in mind, and whenever circumstances require it, pressed to a decision. Can a person claim any interest in copyholds lands in opposition to his own fine? Is he not estopped? That the decision will be in support of the validity of the fine, is a point on which little doubt is entertained by the writer of these observations. The same point applies to alienation by married women of equitable interests in copyhold lands.

A recovery in the courts of Westminster-hall, however, will not have the same effect as a customary recovery (*f*): since a *customary recovery* is the prescribed mode of barring an intail. And a fine cannot, on any principle, be urged as a bar of any other interest than the *intail* in the conusor. On the other hand, if the operation of the fine be under the rules of the common law, and by force of the learning on estoppels, and not by force of the statutes giving operation

(*f*) *Oliver* v. *Taylor*, 1 Atk. 474.

to fines with proclamations against heirs in tail, then common recoveries and fines stand on the same footing in this respect.

[161] *Of the Recovery Deed.*

The tenant to the writ of entry may be made by fine, feoffment, grant, bargain and sale, lease and release ; or, in short, by any assurance which will have the effect of passing the freehold to the intended tenant in the recovery (*g*).

The point to be regarded is, that there shall be a conveyance effectual for this purpose ; and that it shall be made in due time. In general also, and with great propriety, there is a declaration of the uses of the recovery, for the purpose of rendering the title certain, by means of an express declaration, instead of suffering it to depend on a resulting use in favor of the tenant in tail, or the averment of an use in favor of the recoveror.

It has been noticed (*h*), that a fine levied to a person, afterwards named tenant, in a recovery, though at a distant period, will be considered as originally levied, to the use of the conusee, so that he may be deemed a good tenant to the writ of entry. This

(*g*) Supra, 34.

(*h*) *Altham* v. *Anglesey*, Gilb. Eq. Ca. 16. et supra, 36.

case supposes no uses to have been declared in favor of the conusor, in the fine, or of any other person than the conusee.

In treating of the recovery deed, it will [162] be proper to consider,

1st, In what cases a recovery deed is necessary.

2d, Its formal parts.

And 1st, When a fine is levied, and a recovery is to be suffered to the conusee, a deed either of conveyance, or of declaration of the uses of the fine, is not essential to the validity of the recovery.

Also when the writ of entry is brought against the person, who already is the owner of the freehold, a conveyance by deed or fine is not of absolute necessity. In practice a conveyance is proper, and will frequently occur, even in cases attended with these circumstances.

In all other cases, since the intended tenant would not have the freehold without a conveyance made to him, it is of the first importance that such conveyance shall be made, and that the tenant shall have, or *appear* to have, the freehold *during the term*, in which the recovery is suffered.

To guard against the loss of recovery deeds, &c. the statute of 14 Geo. II. c. 20, hath enacted those provisions which have

been already noticed (*i*); and thus hath made a period of twenty years, with enjoyment under the recovery, presumptive evidence of the existence of those deeds by
[163] which a tenant to the writ of entry might have been made.—In many cases, from circumstances, a presumption will be made of a surrender of a prior estate for life, for the purpose of supporting the validity of a recovery. The rules of evidence which govern the doctrine of presumption, are noticed in a former page (*k*).

2dly, Of the formal parts of the recovery deed.

These are,

1. *The Date.*
2. *The Parties* (*l*).
3. *The Recitals* (*m*).
4. *The Testatum Clause, and Consideration* (*n*).
5. *The Operative Words* (*o*).
6. *The Parcels* (*p*).
7. *The Habendum* (*q*) *and Use* (*r*).

(*i*) Supra, 85.
(*k*) Supra, 77.
(*l*) Infra, 165.
(*m*) Infra, 177.
(*n*) Infra, 179.
(*o*) Infra, 182.
(*p*) Infra, 184.
(*q*) Infra, 187.
(*r*) Infra, 189.

8. *The Declaration of the intention of the Conveyance, and the Agreement to suffer the Recovery* (*s*).

9. *The Declaration of the Uses* (*t*).

1. *Of the Date.*

The rule of the common law which required the tenant to have the freehold before judgment was given, has already been noticed (*u*). The statute of 14 Geo. II. c. 20, sec. 6, already cited, has enacted, that "from and after the commencement [164] "of this act, every recovery already suf- "fered, or hereafter to be suffered, shall "be deemed good and valid to all intents "and purposes, notwithstanding the fine "or deed or deeds making the tenant "to such writ should be levied or exe- "cuted after the time of the judgment "given, in such recovery, and the award "of the writ of seisin as aforesaid, pro- "vided the same appear to be levied or "executed before the end of the term, "great session, session or assizes, in which "such recovery was suffered; and the "persons joining in such recovery had a "sufficient estate and power to suffer the "same as aforesaid."

To bring a case within this statute, the

(*s*) Infra, 192.
(*t*) Infra, 194.
(*u*) Supra, 61.

deeds should at least *appear* to be dated within the term of which the recovery shall be suffered. That the title may be free from doubt, the deeds should be *executed*, as well as *appear* to be dated, within the term.

[165]

2. *Of the Parties.*

In a recovery deed, the *proper* parties, either alone, or jointly with other persons, as circumstances may require, are

1. The person who has the immediate freehold.
2. The intended vouchee.
3. The intended tenant.
4. The intended demandant.

Other parties may be added, with a view to give to the deed some other operation besides that of suffering an effectual recovery.

And *first*, of the person who has the freehold.

When the freehold is in one person solely, it is sufficient that there should be a conveyance from that person

When the freehold is in several persons, they should all join in the conveyance, at least for those shares of which the recovery is to be suffered. The recovery will be defective as far as there is the want of the concurrence of the freeholder. Also when

there is a doubt whether the freehold is in one person or in another, the concurrence of each of these persons should be obtained, or the title be considered as doubtful. As often too, as the recovery is of an *aliquot* part of the lands, care must be taken to procure the concurrence of the person who has the freehold in that *particular* share. [166] Also when the object of the recovery is to bar an intail of the *legal* estate, the attention must be directed to procure the conveyance from the person or several persons, in whom the *legal estate of freehold* is vested; whether such person or persons is, or are, a mortgagee or mortgagees, trustee or trustees, or beneficial owner or owners. And when a recovery is to be suffered to bar an intail of the equitable ownership, there is equal necessity, and for that reason, there should be equal anxiety, to have a conveyance from the person who is the owner of the estate of freehold in the equitable or beneficial ownership; whether that ownership is conferred by a legal or an equitable estate.

It often happens, that the intended vouchee has the freehold. When the same person, who is to be the vouchee, has the *freehold*, the number of parties will be reduced, and the observations respecting the owner of the freehold are then, in reference

to the freehold, equally applicable to the tenant in tail. Though the freehold be in one person, and another person is to be the vouchee, still it is the practice that the tenant in tail should join in making the conveyance to the intended tenant, in the writ of entry.—This is rather advisable, in compliance with general usage, and the cau-
[167] tion on which it is founded, than absolutely necessary.—The recovery would be good even though the tenant in tail should not join in the granting words of the conveyance. The freehold would pass from the person in whom it is vested: and this is the essential point.—Beyond this object, all is caution; and the want of attention to it cannot affect the validity of the title. In cases which involve the doctrine of merger, or the destruction of contingent remainders intended to be preserved, care should be taken that the tenant of the freehold, and the tenant in tail, do not join in the same conveyance; or if they join, that they create only a particular estate, so as to leave a reversion in the freeholder.

Before a recovery shall be suffered, the title should be thoroughly and minutely investigated. To obtain the concurrence of all those persons who can, by any construction, or under any rule of law, or any conveyance, will, mortgage, &c. be consi-

dered as having the freehold, is the point principally to be kept in view. To these observations there is the exception, already stated, of the freehold in *lessees* under freehold leases (*x*); and also in persons who have the freehold of certain parcels of a manor (*y*), when the recovery is suffered of the manor, and the reversion remains parcel of the manor. This previous investigation will be a step towards rendering titles more complete, and free from errors, than they are now found to be.

The cautions proper for persons who assist in suffering recoveries, in right of [168] particular estates to which powers are annexed, or who wish to guard against the consequences of a forfeiture, or the merger of their estates in the inheritance (*z*); or the destruction of contingent remainders (*a*); have been noticed in the former part of this chapter.

Secondly. Of the Vouchee.—The intended vouchee or vouchees should be the person or persons by whom the recovery is to be suffered, in respect of some intail. Though in some cases, the tenant in tail may not be a necessary party in the grant, yet, in the declaration of the uses of the recovery, he is, when he continues owner of the estate-

(*x*) Supra, 67.
(*y*) Supra, 65.
(*z*) Supra, 107.
(*a*) Supra, 111.

tail, materially interested. To the extent of his ownership, he is the person from whom the uses must move; and for this reason, his concurrence in the declaration of the uses, is to be regarded as of the first importance (*b*).

A doubt has sometimes been expressed whether several persons being co-parceners, or *tenants in common*, in tail, can join in the same recovery. On that point, the opinion of a highly eminent lawyer was to this effect: "I always thought it doubtful, "but rather inclined to think it bad in an "amicable, as I think it would be in an "adverse action, against all not claiming "merely under the parties, and, conse-"quently, against the issue in tail, and "those in remainder."

[169] The answer to this objection was, That one recovery by the co-heirs A. B. and C. D. of their respective shares, in which they shall be vouched, and vouch over will bar their estate-tail in their respective shares: for it must be remembered, that these persons are *co-heirs*, and co-heirs not only may be, but in point of form, ought to be vouched jointly; and the general practice has been to join several co-heirs in the same voucher (*c*). Indeed, it is said, that

(*b*) *Roe* v. *Popham*, Dougl. 24.

(*c*) Watkins on Copyholds, 533. Edit. II.

upon warranty by the ancestor, one parcener cannot be vouched without the other, Vin. Abr. vol. 22, p. 93, (L. a.) cites 11 Hen. IV. 20, b.; but this must be understood in a qualified sense, namely, that the vouchee may, by special pleading, show that he is only one of the several co-heirs, and compel the tenant to vouch him, jointly with the other co-heirs: but if he omits to do this, still the recovery will be good against the vouchee, and all persons claiming under him; and nothing is more common in practice, than for one of several co-heirs to be vouched *solely* as to her share, and no doubt was ever raised on the validity of a recovery so suffered. The recovery may, in a case thus circumstanced, be supported on the ground of a supposed warranty, by the vouchee *personally;* and there being a voucher over, and recompense, the issue and those in remainder, are precluded from claiming under the old intail. And [170] even a joint voucher of *tenants in common* in tail, is warranted by practice, and it is apprehended by law. And Mr. *Fearne's* opinion in his Posthumous Works, p. 338, goes even further, that a common recovery suffered on a voucher of two persons, who have distinct estates-tail, in distinct parcels of land, will bar the several estates-tail.

It is admitted, that in 22 Vin. Abr. 93,

(M. a) which cites 28 Edw. III. 90, b. it is said, that two tenants in common cannot vouch jointly. But this must be understood, not as a substantive proposition, founded on an objection in law, or on a point of form, against a joint voucher by tenants in common, but as admitting the right, in the person whom they vouch, to counterplead the warranty. And the case in 42 Edw. III. 16, b. and 17, proves, that if several are vouched jointly, and they accept the tenancy of the *intirety*, they are estopped from pleading *several tenancy*, and in consequence, they are bound to vouch *jointly*. And in the case of *Morgan* v. *Culpepper*, reported in Keb. 863, and Siderf. 241, four of eight persons, having a joint freehold, and several inheritances in tail, were vouched jointly, and vouched over, and no doubt seems to have been entertained of their estates-tail, in their respective shares, having been barred, although
[171] the recovery did not bar the shares of their companions in the tenancy.

On the whole, the impression is, that one recovery suffered on a joint voucher of several tenants in common, or of several coparceners, is good in point of law, to bar the estates-tail in their shares of the lands, even although these shares are in distinct tenements, and the tenements were intailed

by distinct gifts: for supposing they had by one and the same deed, or by *several* deeds, conveyed these lands to a tenant; and the demandant, having a title to all the lands, were to demand them by one writ against the tenant, and the tenant having a warranty of all the lands, was to vouch the tenants in tail, what objection exists against his doing this, or against their vouching over? None presents itself; on the contrary, to demand all the lands, by one writ, is consistent with the title of the claimant, and avoids the circuity of several actions, for that which may as well be recovered by one action. That a writ so brought, is good, is assumed to be clear, from the circumstance that no answer suggests itself against the writ in point of form; and if the writ be well brought, all the other proceedings seem of course. There is a rule, indeed, that in all real actions, founded upon a title, as *Escheat*, *Formedon*, &c. the demandant cannot join lands, accruing by two several tenures, or by [172]
two several gifts, in the same writ; *Buckmere's case*, 8 Co. 86: but the very rule, provided for this particular case, proves that when the action is not founded on a *title*, viz. on a title to be *disclosed by the writ*, one writ may be of distinct parcels, comprised in different gifts; and a writ of entry, on which a recovery is suffered, is not founded on a title,

This very distinction was taken in *Buckmere's case*, already cited. It is there said, "but "such actions real, which are founded upon "a tort or deforcement, and do not com- "prehend any title in them, there the de- "mandant may demand in one writ, divers "lands and tenements, which come to him "by several titles." The instance given is, that "if divers lands *descend to me*, from "several ancestors, and I am disseised or "deforced of them, I may have a writ of "right, or a writ of entry, in nature of an "assize, and comprehend all these rights in "one writ, because in *these cases no title is* "*made in the writ*."

On the concurrence of two persons having distinct estates-tail in distinct lands, one in one tenement, the other in another tenement, the opinion of Mr. Fearne was, "*fieri non debuit, sed factum valet*." His reasoning on the case will be found in his Posthumous Works, p. 338.

Thirdly. Of the intended Tenant.—In general, he should be named as a party in the
[173] deed to take the grant of the freehold. Whether he takes the freehold, under an immediate conveyance to him, or under a declaration to his use, is of no consequence. —Let him have the freehold, and all that

regards him is accomplished. However, when he is to have the freehold through the medium of a declaration of use, instead of an immediate conveyance to him, he himself, or another person, must be named as the grantee; since no use can arise without a conveyance to supply a seisin to the use: except in the cases of a covenantor to stand seised, and then the use is supplied from the seisin of the covenantor; or in a bargain and sale, in which latter case the bargainor is seised to the use of the bargainee; and the use is, in each case, executed into estate by the statute of 27 Hen. VIII. When the tenant is to have the use under a declaration on a conveyance, then the conveyance must pass a seisin at the common law, and not be open to the objection, that the use is an use on an use, and for that reason a mere trust.—This objection occurs when there is an appointment under a power, and must be distinguished from mere authority, or a bargain and sale under the statute of inrolments, to A. and his heirs, to the use of B. and his heirs: the appointee or bargainee takes the first use, and the ulterior use is a mere trust; an use in the 2d degree, not executed by the statute, as will be more fully [174] shown in this and the subsequent chapters.

A person resident near the court, in which the recovery is to be suffered, should be

named the tenant. By this arrangement, the expence of a *dedimus* to take his warrant of attorney, or a journey to the court, will be avoided. In general it is preferable to name one person, rather than two persons. When two persons are named, the writ of entry must be brought against both these persons, and they must both appear and vouch over. The want of appearance, or voucher, by one, would vitiate the recovery to the extent of his share.

The recommendation of naming one person instead of several persons to be the tenant, must be understood with the qualification, that only one recovery, or several recoveries in one court, is or are to be suffered. As often as there are to be several recoveries, in distinct courts, there will be a great convenience and propriety, in naming a tenant for the lands in each distinct jurisdiction. In this instance, the lands in each particular jurisdiction should be conveyed to, or at least, to the *use of*, the person who is to be the tenant in the recovery to be suffered in that jurisdiction. On this point, the appropriate observations will be found in a former part of this chapter (*c*).

[175] It is usual for the tenant to execute the recovery deed. This is proper. The want, however, of his execution will not be a de-

(*c*) Supra, 32.

fect in the title. It is rather on account of the declaration of uses, than the validity of the recovery, that the deed is usually executed by the tenant. As the uses are to arise from a conveyance made to the tenant, these uses arise on the recovery without any other assistance from him, than his acting as the tenant. By appearing to the writ of entry he precludes himself and all other persons from asserting that he disagreed to the conveyance, and that nothing passed to him. And the judgment against him draws out of him the estate vested in him as tenant.

Fourthly. Of the Demandant.—Sometimes a purchaser, sometimes a friend, and sometimes a *stranger*, is named the demandant: and in some instances two persons are named. In general no more than one person is named. It has happened that one person has been named in the recovery deed, and another in the recovery; and sometimes the demandant has been required to execute, and at other times his execution has been disregarded. Neither of these particulars will affect the title. So as a demandant or demandants is or are named, in the proceedings, towards the recovery, and the person [176]
or persons so named shall live till judgment given, the recovery will be good. His death before judgment would put an end to

the proceedings. When he lives till the proceedings are complete, the uses will arise, without any concurrence by him in the recovery deed. The uses arise from the seisin which passes to him. He takes *in modum donantis*, and is bound by the declaration of uses in the recovery deed, so as this declaration is in the common form. That the uses may arise, seisin must be delivered. Should the demandant die before seisin is delivered, a writ of seisin must be awarded, and seisin delivered to his heirs, and the writ of seisin returned (*d*), as a means of the execution of the uses, under the statute for transferring uses into possession.

[177]

3. *Of the Recitals.*

The deed or will by which the intail is created, ought, in most cases, to be recited, or at least there should be a reference to the same, and all such facts should be disclosed, as show the right to suffer the recovery with effect. This will greatly aid the title at some future period. It will lead to a discovery of the documents on which the title is grounded ; or, should they be lost, or destroyed by fire, the recital will tend to satisfy future purchasers, that the title is correctly deduced.

(*d*) *Witham* v. *Lewis*, 1 Wils. Rep. 48. 4 Bro. P. C. 504. And supra, 149.

The object should be to show, *first*, that the freehold is in the person by whom the freehold is to be conveyed. For that purpose the determination of all prior estates which existed under the deed or will, by which the intail was created, should be shown. The creation of the estate-tail, and the consequent right to suffer the recovery, should also be stated ; and when the fact warrants it, the determination or failure of all prior estates-tail, the state of pedigrees, &c. should be disclosed by the recitals.

This, it must be remembered, can be done with prudence, in those instances only in which the title rests on clear grounds, and is not involved in difficulty. On the one hand, no conveyancer of integrity will state, as a fact, that which does not exist ; [178] on the other hand, it is his duty to keep his client's title free from a disclosure, which, at a future period, might involve that title in increased difficulty, or raise a suspicion of its validity.

In general, other recitals are to be introduced for the purpose of showing the agreement to suffer the recovery. Such recitals as are in general use will be found in the forms of recovery deeds, contained in the *Appendix*. Other varieties of these recitals, adapted to particular cases, are also added in the *Appendix*.

[179] 4. *Of the Testatum Clause.*

This clause generally shows the object of the deed. For the most part that object is expressed in these, or the like terms. "*And for docking, barring, and destroying all estates-tail, of and in the ——— lands and hereditaments hereinafter described, and also released, or otherwise assured, or intended so to be, and all reversions and remainders expectant or depending on the same estates-tail, and all conditions and collateral limitations annexed thereto, or affecting the same, and for settling and assuring,*" &c. And when different objects are within the scope of the deed, these objects also, are for the most part added. This is form, and not substance; and the omission is immaterial.

Nor is any consideration necessary to the validity of a recovery deed, as such, with the exception that a bargain and sale cannot raise any use, and, it follows, cannot pass any estate to the intended tenant, unless it be founded on a *consideration* of money or money's worth. Therefore, that a recovery deed, grounded on a bargain and sale, which must operate as such, or be ineffectual, may be good; there must be a consideration of money, or money's worth. An instrument, in the form of a bargain and

sale, may, no doubt, operate as a grant. [180] As often, then, as the bargain and sale is void, as such, either for want of a proper consideration, or inrolment within due time, it should be considered, whether the intended bargainor had an estate in remainder or reversion. Admitting he had a remainder or reversion, or that the subject of the deed was an incorporeal hereditament, as a rent or advowson, the deed may be treated as operating as a grant (*e*), notwithstanding the want of any consideration or inrolment. In *Barker* v. *Keat* (*f*), the tenant to the writ of entry was made by an instrument in the form of a lease and release. No consideration was expressed in the clause of grant in the lease. In the reddendum, a pepper corn, which is money's worth, was reserved. On this ground, the lease was considered as a good bargain and sale for a year: so that there was an estate for a year capable of enlargement; and it was enlarged by the release; and the releasee had the freehold, and the recovery was duly suffered, since the writ of entry was brought against this releasee.

This part of the deed is intimately connected with the two divisions, which treat of, 1st, the person who has the freehold (*g*), and

(*e*) Supra, 41.
(*f*) 2 Mod. 249.
(*g*) Supra, 165.

2dly, the intended tenant (*h*) ; for the office
[181] of this clause of the deed is to introduce an effectual grant from the person who has the freehold to, or in favor of the person who is intended to be, the tenant ; or, at least, it must introduce a grant, in favor of some other person, to uses, under which the freehold may be vested in the tenant.

From subsequent parts of this treatise, it will be collected that a grant may be good, though the name of the grantor is omitted, in the words of the intended grant from him, provided the intention, that he should grant, can be collected from the deed.

So a grant may be good, though the grantee is named in the habendum, and not in the grant ; and even though some other person is, by mistake, named in the grant.

On this and other subjects connected with the form of the grant, the observations in the chapter *Release*, will afford the necessary information. That the deed should be sufficient to pass the freehold, is the object to be regarded, both in preparing the recovery deed, and considering the effect of the recovery, with a view to support its validity.

(*h*) Supra, 172.

5. *Of the Operative Words.* [182]

These words ought, in point of form, to vary with the nature and mode of operation of the recovery deed. They must be sufficient to pass the estate.—In the more early period of the history of the laws of property in this country, particular words were allowed only a particular import, and were considered as peculiarly adapted to particular assurances. In modern times, this rule has been relaxed. No more is now regarded, than that there should be such words as declare a manifest intention to convey. Such words, however informal, will operate.

The rules which now prevail, are "*Benigne faciendæ sunt interpretationes chartarum, propter simplicitatem laicorum, ut res magis valeat quam pereat.—Verba intentioni, et non e contra debent inservire.*— Deeds intended, and made to operate one way, may operate another way, if the intention of the parties cannot take place, unless they operate a different way from what they were intended.—Judges ought to be curious and subtle, to invent reasons and means to make acts effectual, according to the just intention of the parties.—More consideration is to be

" had for the substance, to wit, the passing
" of the estate according to the intent of
[183]" the parties, than the shadow, to wit, the
" manner of passing it (*g*)." The application of these rules will be shown in the chapter on *Releases*.

The words of grant ought to proceed from a person as grantor, in favor of the person named as grantee. The observations respecting the nomination of these persons and mistakes in these particulars, will be found in the chapter to which reference has been lately made.

[184]

6. *Of the Parcels.*

In all deeds, and in none more than in recovery deeds, particular attention should be paid, that all the parcels intended to pass, should be included, and that none should be included which it is the intention of the parties to omit.—The points proper to recovery deeds, are,—not to include more lands than are intended to pass —to comprise, either by general or special words, all the lands to which the recovery is to extend,—and to restrain general words to those townships, parishes, &c. which are to be named in the recovery.

It is said, that the issue in tail may de-

(*g*) *Roe* v. *Tranmer*, Willes's Rep. 682.

mand the parcels according to their quality at the time of the intail, without regard to any alteration made in these parcels by the defendant (*h*).

When the parcels are of considerable length, or the description of them is attended with nicety, or involved in any difficulty or uncertainty, general words should be added, extending to all the townships, parishes, &c. named, or to be named, in the recovery, so as to embrace, under these general terms, any parcels omitted out of the particular description. Many a title has been supported under these general words, which would have been defective, or at least doubtful, as far as it depended on the particular description.

Such general words may be to this effect: —*And all other the manors, messuages, farms, lands, tenements, and hereditaments, situate, lying, and being in the several towns, parishes, and places of A. B. C. and D. in the said county of* ———, *of which the said* —— *is tenant for an estate-tail, either in possession, reversion, or remainder, under or by virtue or means of the said hereinbefore mentioned or recited* ———, *and every part and parcel of the same, with their, and every of their rights, members, and appurtenances.*

(*h*) Dyer, 47. a. pl. 6. 1 Burr. 145.

The language of this clause may require considerable variation ; as words of restriction,—or words to embrace lands taken under exchanges, made under inclosure acts, —partition,—lands purchased, and settled to the like uses, &c. &c.

When lands have passed by will under a general denomination, the recovery should have the parcels from the last purchase deed: or if the parcels are materially and substantially varied, then a new description. There should be general words, co-extensive, in effect, with the words of the will,—at least as far as the recovery is to comprise the lands. The modern description should be connected with the ancient description. Thus the identity of the parcels, and the application of the more early title deeds, will be rendered obvious, and free from any doubt arising in consequence of the change in the description of the parcels.

In relation to the parcels, another object to be kept in view, is, to have the lands sufficiently ascertained by particular description, or by general words, to render the intention to include them free from all doubt. This attention will facilitate an application to amend the parcels in the recovery, should circumstances render it necessary to make such an application to the summary and discretionary jurisdiction

of the court, in which the recovery is suffered.

The recovery deed, to be formal, should also have the clause of the "reversion," &c.—Also the clause of "all the estate," &c. except a *particular* estate, and *not the whole interest* of the parties is intended to pass.

As often as the sole object is to suffer a recovery, the clause granting deeds, is unnecessary, and even informal. On the other hand, when the recovery deed is part of a transaction, for the assurance to a purchaser, the usual clause of grant of deeds, will, with great propriety, be added.

7. *Of the Habendum.* [187]

The habendum should be the same in form, in this, as in other deeds; looking only to the object of passing an estate of freehold, to the person who is to be the tenant in the recovery.

Frequently, and indeed generally, the fee is conveyed to the tenant. Whether he takes the fee, or any other estate, so as the same be an estate of freehold, is immaterial. The recovery will be equally free from objection. Even the lowest denomination of an estate of freehold is sufficient to support the recovery, as far as its validity can come

in question. Even though a mere estate of freehold passes by the deed, the fee may be conveyed by the united operation of the deed and recovery. The freehold will pass by the deed, and the fee by the recovery. The uses declared of the recovery will transfer that estate to the person, in whose favor these uses are declared. This follows upon the rule, that whoever comes in as vouchee, comes in of all estates of which he *is or ever was* seised.

These observations suppose the party who has the fee, to be named as tenant, or as vouchee. In case a person who has the fee conveys a *partial estate*, and is no party to the recovery, there will remain in him so
[188] much of his estate as he has not conveyed.

These observations will suggest, that in some cases the fee should be conveyed. Should circumstances of caution require it, this estate may be conveyed, and uses declared, and under these uses a particular estate may be limited to the use of the intended tenant, and ulterior uses may be declared, according to the intention of the parties (*i*). *See form in the Appendix.*

It is to be observed, that no benefit will arise from this practice or caution, except in those instances in which the uses shall be

(*i*) Supra, 114.

declared in favor of persons not named *as parties* in the recovery. Nor in this place must it be passed over unnoticed, that the estate arising from a declaration of uses upon a conveyance, cannot be larger than the seisin conveyed to serve these uses.

There are few instances, however, in which the operation of a recovery is not to give a fee, under the doctrine of disseisin by the tortious alienation of particular tenants (*j*).

On a late occasion, a very learned gentleman had difficulties, whether a common recovery was duly suffered, after tenants for life had levied a fine, amounting to a forfeiture of their estates. He supposed, that the freehold might have been in the trustees under the usual limitation for supporting contingent remainders. The answer to the objection was, that, as the trustees had not entered, they could not have more than a mere right of entry; and the freehold was in the person who claimed under the uses declared of the fine.

Of the Use.

When the grant is to the tenant, to the intent that a common recovery should be suffered, the legal estate will vest in him,

(*j*) See the Author's Argument in *Goodright* v. *Forcester*, 1 Taunt, 578. Co. Litt. 251. a.

without any express limitation of use in his favor.—The declared purpose will prevent the use from resulting, and the grantee will be seised, by the rules of the common law.
[189] *Altham* and *Anglesey* (*k*), *Roe* v. *Popham* (*l*), *Thrustout* v. *Peake* (*m*), are authorities in point, and support this conclusion, were the proposition not sufficiently clear in itself. As often, however, as the title of the tenant to the writ of entry, is to arise from, or to depend immediately on, a declaration of use, that use must be effectual for the purpose. In the first place, there must be a grant adequate in operation to supply a seisin to the uses; and there must not be any prior use, which will either prevent the execution of the use in favor of the tenant, or confer on any other person a title to the immediate freehold.

As often as the title of the tenant to the freehold is to arise from an use, which is expressly declared, the nature of the conveyance must admit of a declaration of use, to be executed into estate, and such use must be declared. On a bargain and sale to *A.*, to have its effect under the statute of uses, the bargainee will take the use, and his estate will be executed by the statute. A subsequent declaration of use, in favor of

(*k*) Gilb. Eq. Cases, 16.
(*l*) Dougl. 25.
(*m*) Str. 12.

B. will be an use of the estate of A.,—an use on an use (*n*), and cannot be executed by the statute. Supposing the estate to be legal, the legal estate will abide in A., and he and not B., is the proper person to be named tenant of the freehold. It is, on one hand, to all bargains and sales by *owners of the legal estate*, to operate under the statute of uses, or through the medium of that statute; and, on the other hand, to those *assurances* only which are *to operate on the legal ownership*, and under the statute of uses, or through its medium, that these observations are applied. [190]

Perhaps, in support of an equitable recovery, a court of equity would consider the equitable freehold as passing to B. The intention of the parties is evidently directed to the object of placing the equitable freehold in him, and in equity, the intention and object of the parties, rather than the form of the instrument, is regarded: and the transaction requires, that B. should have the equitable freehold, as the only means of giving full effect to the intention.

Under these circumstances, also, it may be necessary to recur to the point, that the instrument, even as a legal assurance, may be attended with circumstances, which will allow of its operating as a grant at the com-

(*n*) *Tyrrell's* case, Dyer, 155. a.

mon law (*o*): and any instrument which may operate as a grant, will pass a common law seisin, and uses may be declared with effect, and arise on that seisin. In many cases, this construction might have been resorted to with success, and a title supposed to be
[191] defective, as to the legal estate, might, by this application of the rules of law, have been supported. It remains only to be observed, that on bargains and sales to operate under the rules of the common law; as bargains and sales,—by executors who have an authority to sell,—by commissioners of bankrupt,—and under land-tax, and other acts of parliament; uses may be declared. These bargains and sales pass a common law seisin, and not an use, and uses may be declared of that seisin.

Also, though a bargainee, whose estate is executed by the statute, has no seisin of which uses can be declared with effect, to be executed by the statute, otherwise than under a new conveyance, or a new contract, proceeding from him; yet uses may, in a bargain and sale, be declared of the seisin acquired by the demandant, or recoveror, in the recovery.—Uses of the latter description, are free from the technical objection of being uses on an use. These uses arise, in point of law, from the seisin of the de-

(*o*) Supra, 41, & 180.

mandant.—In short, they arise from a new conveyance, produced by the effect of the common recovery.

Appointments made through the medium of a power in, or arising under, a conveyance to uses, are open to observations very like to those made on bargains and sales.—The appointee takes the immediate use: and all ulterior uses declared of his estate are uses on uses, and have no effect on the legal estate. They are good only as trusts, conferring an equitable ownership. For instance, when A. has a power over the use, and he appoints to B. and his heirs, to the use of C. and his heirs, B. takes the use, and the use declared for the benefit of C. is merely a trust. This subject will be more fully considered in the chapter on *Appointments*.

When circumstances require that a partial estate of freehold should be limited to the intended tenant, and that other uses should be declared, these uses may be declared in the mode which has already been pointed out for that purpose (*p*), and as shown in the form in the *Appendix*. p. 489, 491.

8. *Of the Agreement to suffer the Recovery.* [193]

In every well drawn deed, the agreement

(*p*) Supra, 114.

to suffer the recovery should be fully and clearly expressed.—The common form of this clause is in the *Appendix*.

A short form is also added. The variations in the form, arising from circumstances, are noticed in the notes.

[194] 9. *Of the Declaration of Uses.*

To the clause prescribing the mode of suffering the recovery, there is generally added a declaration of the uses of the recovery itself.—This declaration should be in the form in the *Appendix*, or to that effect, *mutatis mutandis*—It seldom happens, that a declaration of this nature is omitted. When omitted, the use will result (*q*), unless from the consideration paid by the demandant, or from some other circumstance, the beneficial ownership is evidently to remain with him. The cases of *Moxon* v. *Moxon*, and *Hodges* v. *Fowler*, in the Exchequer, 1777, and Com. Dig. *Uses*, D. 2, p. 622, are authorities that the use will result, and it will result to the different parties, according to their former ownership, that is, to tenant for life, for life, &c. &c. with this difference only, that a tenant in tail, instead of taking back an estate-tail

(*q*) *Armstrong* v. *Wolsey*, 2 Wils. 19. *Jones* v. *Morley*, 1 Ld. Raym. 291. Co. Litt. 23. a; 271. a.

by resulting use, will take back an estate in fee, depending on the title to his estate-tail.

Mr. *Cruise*, in his Essay on Uses, p. 205, adverts to the title, depending on the resulting use, as doubtful. He assumes, that it is not clear whether the use which [195] results is in tail or in fee. The cases do not admit of any reasonable doubt on this point. Though they say the recovery shall enure to the "former uses (*r*)," nothing more is meant, than that the parties shall take according to the estates they had at the time of suffering the recovery (*s*).—Indeed, *Mr. Cruise* considers the case of *Nightingale* v. *Ferrers* (*t*), as a direct and positive authority, that where a tenant in tail suffers a common recovery without any declaration of the uses, the resulting use is to him in fee.—One, however, of our best read lawyers doubted on this point.—But there were special circumstances in the case before him, namely, a partial declaration of the *uses*, without any declaration of the use of the *fee:* and on the contrary, a declaration that the recovery should not enure to any other uses. On the same case *Mr. Fearne* gave an

(*r*) *Waker* v. *Snow*, Palm. 359.

(*s*) *Argol* v. *Cheney*, Latch. 82.

(*t*) 3 P. W. 207.

opinion in these terms.—" I conceive that
" where a tenant in tail is vouched in a com-
" mon recovery, it bars the estate-tail, and
" all remainders and reversions thereon
" depending and expectant, and expands
" the estate into a fee-simple, abstracted
" from the declaration of the uses of such
[196]" recovery, because a fee-simple is reco-
" vered. And therefore where no use of
" the fee is declared in such a case, and
" there is no consideration to raise the use
" in the recoveror, it results to the tenant
" in tail in fee, 2 Roll. Abr. 789, pl. 1.
" Godbolt, 180.—*Bury* v. *Taylor*, Gilb.
" Law of Uses, 61, 64. And if such reco-
" very be with the concurrence of a pre-
" ceding tenant for life, then the use also
" results to him for his life. Vide *Waker* v.
" *Snow*, Palm. 359. And consequently, I
" apprehend, that where the use of such
" recovery is only partially, and not com-
" pletely limited, as far as the limitation
" fails, that is, the unlimited use results in
" the same manner as the whole use would
" have done, if there had been no limitation
" of any part of it."

Titles frequently depend partly on a recovery, and partly on a will, made by the person who suffers the recovery. As a will is revoked by the recovery, if suffered sub-

sequently to the will (*u*) the attention should be directed to see, either that the will is subsequent to the recovery, or if prior, that [197] it has been republished since the recovery : and in general it is prudent to advise a person, who suffers a recovery, to republish his will, if he has previously made any.

In *Selwyn* v. *Selwyn* (*v*), the will was made before the recovery was suffered, but after the deed to lead the uses was executed. —In that particular case the will was supported, on the ground already noticed.

The prevailing opinion, some few years ago, was, that as the tenant in tail, by suffering a common recovery, acquired a *fee-simple*, this fee-simple was a new estate. For this reason, the owner of the estate was considered as the *first purchaser*, and his estate as descendible, in all cases, to his heirs *ex parte paternâ*.—The law is now settled on this point, and the distinctions which are established are :

First. If tenant in tail by *purchase* suffer a

(*u*) *Dister* v. *Dister*, 3 Lev. 108.
Marwood v. *Turner*, 3 P. W. 163.
Darley v. *Darley*, Buller's N. P. 267 ; 3 Wils. 6 ; 7 Bro. P. C. 177.
Jones v. *Leigh*, Dom. Pro. 1744.
(*v*) 2 Burr. 1131. Supra, 149.

common recovery, to the use of himself in fee; as he was tenant in tail by *purchase*, the fee taken under the recovery will descend from him to his heirs *ex parte praternâ* (*w*).

Though upon principle, the case of copy-
[198] hold lands appears to be very distinguishable from the case of freehold lands. In one case there is a surrender and a re-surrender; two distinct common law conveyances, like a feoffment and re-enfeoffment, or a fine *sur grant et render*. In the other case, there is, in point of law, merely a conveyance to uses: and it is wholly under the doctrine of courts of equity, as distinguished from the doctrine of the common law, that the use, in its fiduciary state, and now, since the statute of uses, the old use, whether it is taken under an express limitation, or its results, descends in the same manner as the estate was descendible prior to the conveyancce.

Secondly. If tenant in tail by descent from his mother, or any other ancestor, suffer a common recovery, to the use of himself in fee, the person *in whose favor* the intail was originally created, shall be considered as the purchasing ancestor. The fee, taken under the recovery, will be descendible exactly in

(*w*) *Martin* v. *Strachan*, Willes R. 444; 5 T. Rep. 107, Str. 1179; 1 Wils. 2, 66; in a note; 4 Bro. P. C. 486.

the same manner, as if the donee in tail had been the purchaser of an estate in fee-simple, instead of being the purchaser of an estate-tail (*y*). The reason of this rule in courts of equity, and its adoption by courts of law, will be considered in the *Essay on the Quantity of Estates*, when that work shall be re-published. This distinction has been applied as well to *copyhold* as freehold lands (*z*).

This point should be particularly re- [199]
garded in those cases, in which the title is derived by descent from a tenant in tail. Indeed, in every case in which a title is made by a person as heir, care should be taken to see that such person is heir to the former owner, as far as respects the estate in question.

This chapter will be closed with the observation, that in investigating a title, as depending on a recovery, the attention should be particularly directed to these points—

First. That there appears to have been a good *tenant* to the writ of entry at the time of suffering the recovery, or before the end

(*y*) *Abbot* v. *Burton*, 2 Salk. 590, 11 Mod. 181. *Martin* v. *Strachan*, and *Roe dem. Crow* v. *Baldwere*.

(*z*) *Roe dem. Crow* v. *Baldwere*, 5 Term Rep. 104, already cited.

of the term, in which the recovery is suffered.

Secondly. That the person who is vouched had either in point of estate, or in point of right under an estate once vested, an *estate-tail*, and that he vouched over.

Thirdly. That *execution* has been sued, and seisin delivered on the recovery: and

Fourthly. That all the proceedings are regular.

CHAP. II.

On Fines.

A FINE is an assurance by matter of record. It is for the most part founded on a supposed previous existing right. Hence the writ which requires the party to perform his covenant, is the foundation of the fine, and the commencement of the proceedings (*a*).

The parties to a fine are,

First. The plaintiff, frequently denominated the *conusee.*

Secondly. The deforceant, generally denominated the *conusor* (*b*).

Sometimes the plaintiff conusee or grantee is the person who is to have the benefit of the fine. More frequently he is named, merely for the purpose of receiving the estate, that uses may arise from his seisin.

The deforceant is the person by whom [201] the fine is acknowledged, and consequently the person who is the grantor in the fine.

There are several sorts of fine, viz.

1st, A fine *sur conuzance de droit come ceo,* &c.

(*a*) 2 Black. Com. 349. (*b*) Shep. Touchst. 2.

2d, A fine *sur done grant et render.*

3d, A fine *sur conuzance de droit tantum.*

4th, A fine *sur concessit.*

The *first* of these fines is in more general use, and is to be preferred, except in particular cases, in which a forfeiture might be incurred by levying it.—For if a person who has merely an estate for life (*c*) of the *legal* estate, either of a corporeal or incorporeal hereditament (*d*), or who has an estate for life, with a remote estate of inheritance after, and subject to intermediate estates of inheritance (*e*), levy his fine, he will forfeit his estate for life.—So if he accept a fine of this description ; for by the acceptance he admits the inheritance to be in the conusor (*f*).—So if two tenants for life levy a fine of this sort (*g*), or one of them levy the fine, and the other accept it (*h*) both their estates will be forfeited. The concurrence of the person who has the immediate
[202] estate of inheritance, will prevent the fine from operating as a forfeiture (*i*).

On this point there is a difference between fines and recoveries ; for if tenant for life having a remote estate of inheritance suffers

(*c*) Co. Litt. 251, b.

(*d*) Ibid.

(*e*) *Pelham's case*, 1 Co. 101.

Garrett v. *Blizard*, 1 Roll. Ab. 855.

(*f*) 2 Lev. 202 ; Co. Litt. 252, a ; 1 Leo. 264.

(*g*) 1 Leon. 262.

(*h*) 1 Leo. 264. *Smith* v. *Abell*, 2 Lev. 202.

(*i*) *Bredon's case*, 1 Co. 76.

a recovery, there will not be any forfeiture of the estate for life (*k*): no forfeiture will be incurred by a fine levied by an equitable tenant for life (*l*).

In *Smith on dem. Richards* v. *Clyfford*, the same person had the several estates for life and in tail, and the same circumstances occurred in *Pelham's* case (*m*); each case arose on a common recovery: it was decided in one case that there was not any forfeiture; and in the other case it was decided that there was a forfeiture. These cases are completely at variance; and no sound lawyer, versed in the rules of property, will feel any difficulty in assenting to the doctrine in *Pelham's case*, as most consistent with our system of tenures.

The fine *come ceo*, &c. is an acknowledgment on record of a previous gift or feoffment, and takes its name from this circumstance (*n*). *Primâ facie*, and without any words of limitation, it passes a fee (*o*). It admits however of words of express limitation for life or in tail (*p*): and when there are words of express limitation, the fine will pass that estate only which is expressed in

(*k*) *Smith dem. Richards* v. *Clyfford*, 1 Term Rep. 738. Supra, 111.

(*l*) *Lethieullier* v. *Tracy*, 3 Atk. 730.

(*m*) 1 Co. 14 b.

(*n*) 2 Black. Com. 348, 352.

(*o*) Co. Litt. 9 b.

(*p*) *Hunt* v. *Bourne*, 1 Salk. 340.

Bro. Abr. Fine, pl. 12. Co. Read. 2.

the concord ; being the clause of grant. And as often as the grant is confined to that degree of interest, of which the conusor is the owner, no forfeiture will be incurred, because there is no assertion of ownership to the disinheritance of the reversioner. Such assertion of ownership is the cause of forfeiture.

[203] This is that species of fine which is almost invariably levied by the owner of an estate in fee-simple, or of an estate in fee-tail, either in possession, reversion or remainder. When levied by tenant in tail in possession, it has the operation of a feoffment, and except in particular cases, (see Com. Dig. title *Discontinuance*,) it creates a *discontinuance* of the estate-tail (*q*) ; that is, it puts an end to, or discontinues, the title under the estate-tail, and gives a new title depending on the operation of the fine, considered as effecting a *tortious alienation*.

As often as this fine is levied by a person who is *seised* of an estate, it gives or transfers the seisin, either for an estate in fee, or for the time expressed in the concord of the fine ; and *uses* may be, and generally are declared of this seisin.—If no uses be declared, the use will result (*r*), unless the grant be for a particular estate, or except there be

(*q*) Co. Litt. 325, a; 2. Inst. 335; 10 Co. 96. *Armstrong* v. *Wolsey*, 2 Wils. 19.

(*r*) Co. Litt. 23, a; 271, a & b.

some circumstance to keep the seisin in the conusee.—When the use results to the former owner, it will result according to the ownership he had at the time of levying the fine, except that his estate-tail, if any, will, [204] in case there be a discontinuance, be a fee-simple, and if there be discontinuance, a determinable fee (*s*).

So if uses be declared only of part of the estate, or of part of the lands, the use will result for the residue of the estate, or for the residue of the lands (*t*): unless such resulting use would be contrary to the implication of law, as immediately annihilating a particular estate expressly limited to the conusor, or there be some circumstance, or expression of intention, to rebut the resulting use.

Whenever the use results to the conuzor in fee, or is expressly limited to him, this use will be descendible (except, perhaps, in the case of a discontinuance, for that point is doubtful), exactly in the same manner as if the first purchaser of the estate of which the party was seised, at the time of levying the fine, had been the first purchaser of the estate arising from the use so limited or so resulting (*u*).

(*s*) Per Holt in *Machell* v. *Clerk*, Lord Raym. 778.
Doe ex dem. *Gregory* v. *Whicelo*, 8 T. Rep. 211.

(*t*) Co. Litt. 22, b; 23, a; 271, a. & b.
Woodliff v. *Drury*, Cro. E. 439.
Clere's case, 6 Co. 17.

(*u*) *Fenwick* v. *Mitford*, 1 Leon. 182.
Earl Bedford's case, Poph. 3.
Abbot v. *Burton*, 2 Salk. 590.

Respecting the *discontinuance*, which may be created by this fine, it must be remembered, that no one except the person *actually seised of an estate-tail in possession*, being an
[205] estate conferring a right to the immediate freehold, can discontinue the estate-tail (*y*).

In *Seymour's* case (*z*), the tenant in tail had made a bargain and sale in fee, and afterwards levied a fine, as a perfectly distinct transaction, to the barginee: and it was held that this fine did not create any discontinuance.—The ground of that determination was, that the tenant in tail was not at the date of the fine seised of the estate-tail, but had before the fine parted with his estate by the bargain and sale.

In *Doe ex dem. Ordiane* v. *Whitehead* (*a*), the tenant in tail conveyed by indentures of lease and release, and afterwards, in pursuance of a covenant contained in the indenture of release, he levied a fine to the releasee; and it was adjudged that the lease, release, and fine, were several parts of the same assurance, and that the fine created a discontinuance of the estate-tail. Thus in fact, or in construction of law, the fine was by a person seised of an estate-tail in possession.

It is frequently material to advert to the question, whether a fine does or does not

(*y*) *Bredon's case*, 1 Co. 76.
(*z*) 10 Co. 95.
(*a*) 2 Burr. 704.

create a discontinuance, for a discontinuance varies the remedies of the persons not barred by the fine. And it is to be remembered, that if A. be tenant for life, with remainder to B. in tail, a fine levied by B. with or [206] without the concurrence of A., will not create a discontinuance (*b*). And no discontinuance can be created of an estate in rents, or other incorporeal hereditaments (*c*).

After a discontinuance, the issue in tail, if not barred by the operation of the fine, &c. or the persons in remainder or reversion, have merely a right of action, and cannot recover the lands, otherwise than by a *formedon* in *descender*, *remainder*, or *reverter*, according to the nature of their title (*d*).

Of consequence they cannot maintain an ejectment (*e*). Another consequence is, that the persons who had the remainder or reversion *cease to have any estate*. They have merely a right of action. This right of action cannot be transferred by grant, nor, as it is apprehended, is it *devisable*. It may be extinguished by release, fine, &c. The question whether a right of entry, or of action, is devisable, was considered in *Goodright* v. *Forrester* (*f*). In the King's Bench it was decided that the right of entry was

(*b*) Carth. 110.
(*c*) Co. Litt. 332.
(*d*) *Doe* v. *Whitehead*, 2 Burr. 704.
(*e*) Ibid.
(*f*) 8 East, 552; 1 Taunt. 578.

not devisable. The point was made in the argument in the Exchequer Chamber. In that court, the case was disposed of, principally, on the point, made for the first time, that the plaintiff was barred by the statute of non-claims on fines. *Ch. J. Mansfield*, who presided, declared that since it would be unnecessary to decide on any of the points argued in the court of King's Bench, it need not be at all inferred or supposed that the authority of the judgment of that court was in any respect impeached by the decision in the Exchequer Chamber.

It is sometimes necessary to advert to these points of discontinuance, in considering the state of titles under abstracts, and in cases for opinion; also in considering the remedies to be pursued for recovering any
[207] lands which have been intailed; or the defence to be made to a suit brought for establishing a claim to an intailed estate.

Sometimes also, particularly, and it is believed exclusively, in the case of fines by *tenants for life* (*g*) of the *immediate freehold*, a fine *devests* an estate without discontinuing it. When the fine devests the estate, there is merely a right of entry, and no estate in the persons who have the remainder or

(*g*) Per *Hale* in *Focus* v. *Salisbury*, Hard. 400. *Whetstone* v. *Wentworth*, Dyer 72 b, in margin. Litt. sec. 415. Co. Litt. 251, 327 b. 1 Co. 140. 1 R. Ab. 676 (G) pl. 3.

reversion. Except there be a discontinuance, or devesting, the person who has the remainder or reversion in fee continues seised of that estate, and is competent to alien the same, in the same manner as he might have done if the fine had not been levied.

A tenant in fee, or even of a base or determinable fee, cannot either devest or discontinue the inheritance.

And the issue in tail, unless barred by the fine, or the person in remainder or reversion, when their right of entry commences, may lawfully enter, and, as a consequence, may maintain an ejectment.

In the particular case of a fine with proclamations, which devests the estate, for *every* fine does not devest the (estate (*h*)—) or of a fine levied after estate is devested, an entry must be made for the *express* and *declared* purpose (*i*) of avoiding the fine, before an ejectment can be maintained (*k*): and the demise in the ejectment must be laid on some day subsequent to the time at which the entry is made.

And upon principle, and even the autho-[208]
rity of decided cases and of the text writers, it may safely be concluded that when the person who had the remainder or reversion,

(*h*) *Carhampton* v. *Carhampton*, 1 Irish Term Rep. 567.
Podger's case, 9 Co. 104.

(*i*) *Clerke* v. *Rowell*, 1 Mod. 10; 1 Vent. 42.

(*k*) *Doe ex dem. Compere* v. *Hicks*, 7 Term Rep. 433.

has merely a right of entry, he cannot, after his estate is turned into a right of entry, make any alienation (*l*).

A person who has merely a right of action, or of entry, or a contingent remainder, or other future or executory interest, which does not give a vested estate, should cautiously avoid levying this species of fine (*m*), unless he means to extinguish his interest, for as rights of action, &c. cannot be *transferred*, the conusee in the fine cannot derive any advantage from the fine.

On the other hand, strangers to the fine, that is, persons not parties to it, may avail themselves of the fine, to preclude the title of the conusor in the fine: and a party will not be allowed in opposition to his own fine to assert a title to the lands (*n*).—The consequence is, the fine enures to the benefit of the persons to whom the right, &c. might have been released, exactly the same as if the fine had been a release.—Hence the resolution in *Buckler's* case (*o*); that if the
[209] disseisee levy a fine to a stranger, the disseisor shall hold the lands for ever; for the disseisee, against his own fine, cannot claim

(*l*) Perk. s. 65, 85, 86. 157. Litt. s. 347. Co. Litt. 48 b. 214 a, 266 a. Shep. Touchst. 325; Cro. Car. 304; 11 Mod. 128. 1 Burr. 113; 8 Vess. J. 282. *Goodright* v. *Forrester*, 8 East. 552, 1 Taunt. 578.

(*m*) Shep. T. 14. *Weale* v. *Lower*, Polexf. 54.

(*n*) *Edwards* v. *Rogers*, Sir W. Jones, 456.

(*o*) 2 Co. 56 a.

the land, and the conusee cannot enter, and the right which the conusor had cannot be transferred to him, but by the fine the right is extinct, whereof the disseisor shall take advantage.

In *March*, 105, it is reported in a short note, that this point was called in question, and denied to be law. The decision in *Moor's* case (*p*) is agreeable to the resolution in *Buckler's* case, and the weight of authorities supports the resolution. And although in *Vick* v. *Edwards* (*q*), Lord *Talbot* seems to have entertained an opinion, that trustees who had a contingent remainder, might *transfer* that remainder, and make a good title to the same by the operation of a fine; that opinion does not appear to have been well considered, or to be reconcileable with the established authorities (*r*).

A fine *sur concessit* for years, or a demise by indenture for years, will not extinguish the right.—It will merely bind the estate when it shall vest (*s*).

It follows, that in all cases in which it is an object to preserve the contingent interest, [210] or the right, and at the same time to bind the contingent interest, when it shall vest, or the right when restored, resort should be had to a fine *sur concessit* for years, or to

(*p*) 2] Roll's Rep. 311. Palm. 365.
(*q*) 3 P. Will. 372.
(*r*) Infra, 302.
(*s*) *Weale* v. *Lower*, Pollexf. 54.

a demise by indenture for years, as the only effectual means of attaining the object. As often as a contingent interest in tail, or right in tail is to be bound, a fine *sur concessit* with proclamations will be necessary, with reference to the issue in tail.

In extinguishing the right, &c. a fine *sur conuzance de droit tantum*, or a fine *sur grant et render*, or a fine *sur concessit* in fee, will have the same operation as a fine *sur conuzance de droit come ceo, &c.*

Secondly. A fine *sur grant et render* is now nearly obsolete in practice.—It consists of two parts—

1st, Of a grant;

2d, Of a render;

And has the like operation as a feoffment and re-enfeoffment.

Hence if a man seised in fee, *ex parte maternâ*, grant to A. and his heirs (*t*), who renders the same lands to the original conusor and his heirs, the estate taken under the render will be descendible to the heirs, *ex parte paternâ*, because the conusee in the render is
[139] the first purchaser of that estate. He takes the same by a conveyance at the common law, and not under an use arising from his former ownership.

By the rules of the common law, a man cannot grant to himself, or to his wife,

(*t*) Dyer, 237, b. *Price* v. *Langford*, 1 Salk. 337.

(who is considered as part of himself,) nor can he grant to a stranger, reserving to himself a particular estate.

For this reason, prior to the statute of uses, settlements were made by feoffment and re-enfeoffment, or by fine *sur grant et render*, or by demise and re-demise. Since that statute, which enables the party to raise an use from the seisin of the conusee, to be executed into estate by the statute, these double fines, &c. have fallen into disuse.

And there are many purposes to be accomplished by a conveyance, or a fine, to uses, which are not to be effected by a feoffment and re-enfeoffment, or a fine, *sur grant et render*.—As the re-enfeoffment, and the render in the fine, are assurances at the common law, and the grantees are seised by the rules of that law, no powers of leasing, jointuring, &c. shifting or springing uses, can be annexed to their estates, as far they are legal estates at the common law ; while such powers, &c. may be raised by a declaration of the uses of the conveyance or fine.

It is true, that as the conusees on the render are seised by the rules of the common law, uses might be declared of their seisin ; but this would be to do by circuity and by [212] two assurances, that which may be accomplished with equal effect, by one assurance.

Besides, a conveyance to uses is attended

with less expence than a conveyance and re-conveyance. Hence the preference given, in modern practice, to conveyances to uses.

The points which have arisen on this double fine are noticed by *Mr. Cruise* in his Essay on Fines. As this fine has fallen into disuse, the learning on the subject is become rather a matter of curiosity than of utility.

Thirdly. A fine *sur conuzance de droit tantum*, professes to give, or transfer, only the right or estate which is in the conusor. It asserts no positive right. It is generally used to pass a reversionary interest, or to surrender the life-estate of a tenant for life.

It seems also to be a proper fine to be levied by a person, who has an estate for life, with a remote estate of inheritance, and wishes to convey both estates, so as to avoid the forfeiture of the estate for life. As each of these objects may be attained by the fine *sur concessit*, the fine *sur conuzance de droit tantum* is now very rarely levied.

Uses may be declared of a seisin transferred by this fine, when it passes a seisin.

[213] *Fourthly.* A fine *sur concessit* may be either for years, for life, in tail, or in fee (*u*). In one case (*v*) it was admitted that it may be by the general words "All and whatsoever else the conusor hath in the premises."

(*u*) *Drummond* v. *Ludlow*, 2 Taunt. 84.

(*v*) *Pigott* v. *Earl of Salisbury*, 2 Mod. 109.

In a late case, the court of Common Pleas would not permit a fine in these general terms to be passed (*w*). The object of the fine in the last-mentioned instance was to embrace lands held for life, and also lands held in fee.

The fine *sur concessit* is in frequent use, for the purpose of conveying the estates of married women who are tenants for life, or for creating *terms for years*, which are to be binding, by way of estoppel, on contingent, or executory interests.

Fines are also distinguished as of two sorts.

1st, Fines at the common law.

2d, Fines with proclamations.

It rarely happens that a fine is levied without proclamations. When a fine is so levied, it cannot be used either as a bar to the issue of tenant in tail, or as a bar by non-claim.

On the other hand, a fine without proclamations, operating merely and simply as a *conveyance*, has the same effect as a fine with proclamations.

And a fine so circumstanced will also create a discontinuance, when levied by a tenant of an estate-tail in possession (*x*). No actual entry is necessary to avoid this fine (*y*).

(*w*) *Seymour* v. *Barker*, 2 Taunt. 198.

(*x*) *Hunt* v. *Bourne*, 1 Salk. 339.

(*y*) *Jenkins* v. *Prichard*, 2 Wils. 45.

In short an actual entry is now necessary
[214] only in the single instance of a fine with proclamations.

Fines with proclamations, are fines at the common law, with the addition only of proclamations made, for the sake of notoriety, in pursuance of several statutes (*z*).

Two objects are to be attained by the proclamations.

First. To protect, by reason of non-claim on the fine, a defective title from dormant claims.

Secondly. To bar the issue in tail when the fine is levied by tenant in tail.

The general objects for which fines are levied are:

1st. As a conveyance by married women.

2d. As a conveyance by issue in tail.

3d. To gain a title, or confirm one, by non-claim.

First. A married woman cannot convey her freehold, or inheritance, so as to bind herself or her heirs without some assurance of record, as a fine or common recovery: and except in those instances in which a recovery is to be suffered for some other purpose, as to bar an estate-tail with remainder over, &c. a fine is generally levied by the
[215] husband and wife, when they are to alien her freehold or inheritance. In no other instance

(*z*) 4 Hen. VII. c. 24. 32 Hen. VII. c. 36.

is a fine necessary by the common law, merely and simply as a conveyance.

The fine levied for the purpose of being a conveyance, may be either with or without proclamations; for the proclamations are not necessary when the sole object of the fine is to pass the estate of the wife.—For the security of the title, and to obtain the protection of the statute of non-claim, it is always advisable to have the fine proclaimed.

The fine is equally necessary, whether the wife has an estate for life only, or an estate of inheritance.

But no fine is necessary when the wife has merely an authority not coupled with an interest, or when a power of appointment is given to a married woman, to be exercised notwithstanding her coverture, or which, from the nature of the power, is to be exercised during the coverture. In *Burnaby* v. *Griffin*, (*a*) *Lord Chancellor Loughborough* decided, that a woman who had a separate estate, by way of trust, which gave her the equitable ownership of the freehold, was competent to transfer the same without a fine.

Secondly. In consequence of the statute [216] *de donis*, which restrained alienations by tenant in tail, and declared, "*Et si finis super* " *hujus modi tenementum in posterum levetur*,

(*a*) 3 Ves. jun. 266.

"*ipso jure sit nullus,*" tenant in tail was incapacitated from alienating intailed lands, otherwise than by means of a feigned recovery, till the statutes of 4 Hen. VII. and 32 Hen. VIII. were passed, and enabled him to alien the intailed lands by a fine with proclamations.

The statute of the 4 Hen. VII. which is the statute of non-claim on fines, enacted that, the proclamations so made as therein mentioned, the said fine should be final, and conclude *as well privies as strangers*, except women covert, other than parties to the said fine, every person then being within the age of twenty-one years, in prison or out of this realm, or not of whole mind at the time of such fine levied, not parties to such fine.

And in the 19 Hen. VIII. (*b*), the majority of the judges were of opinion, that a fine levied by tenant in tail, according to the statute of Hen. VII., was a good bar to his issue. Some of the judges, however, argued that the issue were not barred by the
[217] fine of their ancestor, not being privy to him, but claiming the estate immediately from the donor *per formam doni.*

To obviate the doubt entertained of the operation of the statute of 4 Hen. VII., the

(*b*) Br. Abr. *Fine* 1; Dyer, 2. b; 4 Reeves, 334; Harg. Co. Litt. 121 a. n. 1.

statute of 32 Hen. VIII. was passed.—It expressly recites that doubts had arisen respecting the statute 4 Hen. VII. as to barring the issue in tail, and enacts, "That "all and singular fines, as well heretofore "levied as hereafter to be levied with pro- "clamations according to the statute, by "any person or persons of full age, of one "and twenty years, of any manors, &c. "before the time of the said fine levied, in "any wise intailed to the person or persons "so levying the said fine, or to any of the "ancestors of the same person or persons, "in possession, reversion, remainder, or in "use, shall be immediately after the same "fine levied, ingrossed, and proclamations "made, adjudged, accepted, deemed, and "taken, to all intents and purposes, a suf- "ficient bar and discharge for ever against "the said person and persons and their "heirs, claiming the said lands, tenements, "hereditaments, or any parcel thereof, only "by force of such intail, and against all "other persons claiming the same or any "parcel thereof, only to their use, or to the "use of any manner of heir of the bodies [218] "of them, any ambiguity, doubt, or con- "trariety of opinion, risen or grown upon "the said statute to the contrary notwith- "standing."

It is clear, under this act, that tenant in

tail of a vested estate, either in possession, remainder (*c*), or reversion, may, by a fine with proclamations, alien that estate so as to bind his issue.

So if he has merely a contingent or executory interest in tail, he may, by levying a fine with proclamations, bar his issue in tail, or, according to the nature of the assurance, bind them by estoppel.—So he may bar his issue, though the estate-tail be discontinued, or devested (*d*), or previously conveyed (*e*).

In short, the words of this statute are so strong and comprehensive, that the issue in tail can never claim a right to succeed to lands intailed, in opposition to the fine of their ancestor or parent who is within the line of the intail, even though the fine be levied, while the person levying the same
[219] has merely a hope, or chance of succession, as is the situation of the issue in tail in the life-time of his ancestor (*f*).

And even as between collaterals (*g*), the fine will be a bar, if levied by the person on whom, or on whose issue, the intail, or the right to the intail, afterwards descends.

(*c*) Shep. T. 25; 6 Jenk. Cent. 96; Case of Fines, 3 Co. 84. Co. Litt. 372. a.

(*d* *Zouch* v. *Bumfield*, 3 Co. 90. a.
Jenk. Cent. 275.

Archer's case, 3 Co. 90. a.

(*e*) *Goodright* v. *Mead*, 3 Burr. 1703.

(*f*) *Archer's* case, 3 Co. 90; Hob. 333.

(*g*) Co. Litt. 372. Hob. 258.

Thus if A. be tenant in tail, and has issue B. C. and D., and B. levies a fine with proclamations in the life-time of his father; this fine will, at all events, bar his own issue; and, if he or his issue should survive the father, it will also bar C. and D. and their issue. But if B. should die without issue inheritable to the intail, and in the life-time of his father, his fine will not be any bar to C. or D. or their issue.—So if C. the second son should levy a fine in the life-time of his elder brother, though this fine would have no effect as against B. or his issue, whether his father was living or dead; yet, if C. or his issue should survive A., and also B. and his issue, the fine would be a bar to D. and his issue. So that the bar of the fine, as between collaterals, depends on the fact, that the person levying the fine becomes the person on whom the intail, if existing, would have devolved (*h*).

Also a fine levied by one of two parents, [220] when the intail is to both parents, will bar the intail (*i*). In this particular a fine and a recovery have a different application (*j*). The operation of the fine has its peculiarity by force of the statutes of H. VII. & H.

(*h*) *Duncombe* v. *Wingfield*, Hob. 254. *Mac William's* case, Hob. 332.

(*i*) *Beaumont's* case, 9 Co. 138. *Baker* v. *Willis*, Cro. Car. 476.

(*j*) Supra, 143.

VIII. of non-claim, and the construction which that statute has received.

In this respect there is a departure from the rules of the common law, by which the heirs or the issue could never be barred or bound as to any share, except by the act of alienation of the parent or ancestor who was the owner of that share.

This construction of the statute H. VII. and H. VIII. gave rise to the decisions to be found in *Beaumont's case*, 9 Coke In. which was reviewed in *Baker* v. *Willis*, Croke Ch. and which led to some of the most abstruse points, and some of the first difficulties in the History of Titles.

For though the fine of husband will, under these circumstances bar the issue, it will not bar the wife on death of husband. The wife will be entitled to the whole, if husband and wife were tenants by intireties, and to a moiety if they were joint-tenants ; and yet the wife will have an estate which cannot descend to the heirs in tail as such ; still, however, her estate retains those qualities of the ancient entail, and it should seem she is qualified to suffer a recovery, and by that means bar those who have interests in reversion or remainder, expectant on the gift of the estate-tail to her and her husband.

In point of law the husband by force of

statute precludes the heirs in tail as such from taking under the gift, but he leaves the title of the wife in all other respects in the same condition as if this enactment had not given this extraordinary operation to the fine of the husband.

A fine levied by the issue of tenant in tail will have no effect, unless they are the issue inheritable to the intail. Thus, when the intail is to the male or female descendants, a fine levied by the issue of the other sex, will not be of avail, to bar the intail (*k*).

And a fine levied by a daughter, or by an uncle, &c. being heir *pro tempore* (*l*), and whose title, as heir, is afterwards defeated by the birth of a *nearer heir* to the intail, will not bar the more immediate heir, or his issue.

From these observations it will be collected, there are several instances, in which a fine will be effectual to bar the issue in tail, although under similar circumstances a common recovery would not bar them. Resort should for this purpose be had to the chapter on Common Recoveries, as to owners of contingent, or executory, and future interests in tail, &c.

To these observations it may be added, that a fine levied by tenant in tail, after possibility of issue extinct, is considered as a-

(*k*) Shep. T. 20. (*l*) Hob. 333.

[221] fine levied by tenent for life, and will incur a *forfeiture* of his estate (*m*).

Also when there is an estate-tail, *of the gift of the crown, for services performed*, and the reversion or remainder is in the crown, the issue in tail is protected from the bar of the fine of their ancestor (*n*).

And when a woman has an estate-tail of the provision of her husband, or any of his ancestors, and under the circumstances already noticed in discussing the learning on recoveries (*o*), as it applies to this subject, a fine with proclamations, levied by the woman alone, will not be a bar to the heir in tail, or even a discontinuance of the estate-tail, or, as a consequence, of the reversion or remainder expectant on that estate.

Thirdly, By the stat. 4 Hen. VII. c. 24, it is enacted that fines shall be proclaimed in manner therein mentioned. And by the 2d section of that act, it is enacted, "that "the proclamations so had or made should "be final, &c. with a saving to every per- "son and persons, and to their heirs, other "than the parties to the said fine, of such "right, title, and interest, as they have to "or in the lands, tenements, or other here-

(*m*) Co. Litt. 28. a.
(*n*) 32 Hen. VIII. c. 36, s. 4. Co. Litt. 372.
(*o*) Supra, p. 19.

" ditaments, at the time of such fine en-
" grossed ; so that they pursue their title,
" claim, or interest, by way of action or
" lawful entry within five years next after
" the same proclamations had and made,"
with a further saving " to all other persons,
" of such action, right, title, claim, and
" interest, in or to the said lands, tene-
" ments, or other hereditaments, as shall
" *first* grow, remain, or descend, or come to
" them, after the said fine engrossed, and [222]
" proclamations made, by force of any gift
" in tail, or by any other cause or matter,
" had and made before the said fine levied,
" so that they take their action, or pursue
" their said right and title, according to
" law, within *five* years, next after such
" action, right, claim, title, or interest
" to them accrued, descended, fallen, or
" come."

And by the statute of 4 Anne, c. 16, s. 16, it is enacted, " that no claim or entry to be
" made of or upon any lands, tenements, or
" hereditaments, shall be of any force or
" effect to avoid any fine levied, or to be
" levied with proclamations according to
" the form of the statute in that case made
" and provided, in the court of Common
" Pleas, or in the courts of sessions in any
" of the counties palatine, or in the courts
" of grand sessions in Wales, of any lands,

" tenements, or hereditaments, or shall be a " sufficient entry or claim within the sta- " tute of limitations, unless upon such " entry or claim an action shall be com- " menced within one year next after the " making of such entry or claim, and pro- " secuted with effect."

That a fine may operate to give title by nonclaim, it is necessary that an estate of freehold should be in some or one of the parties to the fine, at the time of levying the same. Unless the freehold be in one of
[223] the parties at the time of levying the fine, the fine, as to the purpose of barring by nonclaim, seems to be actually void, or voidable by the plea that " *partes finis nihil habuerunt tempore finis levati* (*p*)." Hence a fine levied by a person who has an estate at will or a *term for years*, or other like chattel interest, as an estate by statute staple, &c., without first acquiring the freehold by means of a feoffment, will be merely void, or at least voidable (*q*).

So a fine levied covinously by a tenant for years, who continues the possession and pays rent, will be void, notwithstanding he

(*p*) 3 Wils. 249; Dyer 215.
Smith v. *Packhurst*, 3 Atk. 141.
Rowe v. *Power*, 2 New Rep. 1.

(*q*) Bac. Abr. *Remainder* G.
Smith v. *Packhurst*, 3 Atk. 141.

has previously made a feoffment (*r*). This objection against the fine is grounded on the rule of the common law, which suppresses and counteracts all fraud.

So a fine levied by a *cestui que trust*, will be void, as against all persons who have a title to the legal estate, unless the legal estate of freehold be acquired before the fine is levied; for a fine cannot operate against a legal estate, unless it has legal qualities and legal efficiency, and an equitable freehold will not support the legal operation of a fine(*s*).

But it seems, as between *cestuis que trust* a title may be gained by non-claim, by means of a fine with proclamations, under the like circumstances, as it might be gained at law, as between the owners of the legal estate. And a fine with proclamations by a person in possession, as owner of an equity of redemption, will, it should seem, bar those who might dispute the title to this equity (*t*).

The general rule is that a fine will not operate as a bar by non-claim, unless the estate to be barred, be previously devested, or be devested by the operation of the fine [224]

(*r*) *Fermor's* case, 3 Co. 77. Bac. Abr. *Remainder* G.

(*s*) 27 Hen. VIII. 20. Bro. Abr. *Fine*, pl. 4.

(*t*) 2 Freeman, 21.

(*u*). Hence the necessity of that which has been called *adverse possession*, in order that a fine may operate by non-claim.

It is agreed, that if one pretending title to land, entereth and disseiseth the rightful owner, and afterwards with an intent to bind the disseisee, he levieth a fine with proclamations, this fine may operate by non-claim (*v*).

So if a man enter under a devise which is void, he by his entry gaineth the freehold by *abatement*, and a fine levied by him with proclamations may be used as a bar by non-claim. Or if the heir at law enter notwithstanding a devise in favor of some other person, and levy a fine with proclamations, non-claim on this fine will run with effect against the devisee (*w*).

So when a bargain and sale is made, and for want of inrolment, misnomer, or the like, it is void, but the bargainee enters, and levies a fine with proclamations, under these circumstances, as the intended bargainee gaineth a freehold by his entry, this fine may become a bar to the title of the bargainor (*x*).

The like observation is applicable to all

(*u*) *Podger's* case, 9 Co. 104.
Saffyn's case, 5 Co. 123.
(*v*) 3 Co. 79, a & b.
(*w*) *Hulm* v. *Heylock*, Cro. Car. 200.
(*x*) *Croft* v. *Howell*, Plow. 536.

other conveyances which import to pass the [225]
freehold, and which are void for want of some ceremony attending them; and the intended alienee enters, by force of such defective conveyance, and gains the freehold by disseisin, and afterwards levies a fine with proclamations.

So if tenant for life, having the immediate freehold, levy a fine with proclamations, and such fine imports to be a grant of the fee, this fine may be used as a bar by non-claim (*y*).

So if any person enter claiming the freehold; or enter on a vacant possession claiming the freehold; or enter under a void conveyance, purporting to pass the freehold; and thus acquire a freehold, either by abatement, intrusion, or disseisin; in all these cases a fine levied by that person after his entry, will be a good foundation for the commencement of a title by non-claim. A mere instantaneous seisin, as if a person steps on the land and withdraws, leaving the rightful owner in possession, will not suffice (*z*).

But a person who has a *mere naked possession*, or who dispossesses a tenant for years, and *claims the term*, or any other chattel

(*y*) *Laund* v. *Tucker*, Cro. Eliz. 254; 3 Co. 78 b; *Goodright* v. *Forrester*, 8 East, 552. 1 Taunt. 578.

(*z*) Per Lord Hardwicke, in *Townshend* v. *Ash*, 3 Atk. 339.

interest, or who merely receives the rent of
[226] my tenant (*a*), while he continues my tenant (*b*), does not gain any freehold which will be a foundation for a fine. On the latter point the law is, that the possession of the tenant is the possession of him in remainder or reversion (*c*).

On this account it is frequently prudent to oust the tenant, and, in some cases, even to make a feoffment preparatory to levying a fine (*d*).

So if A. be tenant for life, remainder to B. for life, remainder to C. in fee. A fine by B. will not *devest* the estate of A. (*e*) It may confirm, not defeat, the particular estate.

Twist's case (*f*) depends on this distinction, and it is questioned in 2 New Rep. 37, without sufficient consideration. The ground of *Twist's* case is, that the tenant for life and remainder-man have portions of one estate, and are connected in privity; and unless the fine of the remainder-man barred the title of dower, the dowress might establish her title of dower against the tenant for life, and as a consequence against the remainder-man.

(*a*) Co. Litt. 323, 324.
(*b*) *Townsend* v. *Ash*, 3 Atk. 336.
Smith on the dem. of Dormer v. *Packhurst*, 3 Atk. 141.
(*c*) Co. Litt. 243 a, 324. Plow. Com. 191.
(*d*) Litt. s. 611.
(*e*) Co. Litt. 251 b; *Braybrooke's* case, 1 Leon. 40. Bac. Abr. *Remainder*, 832.
(*f*) Shep. Touchst. 27.

And although there be an estate to A. for years, remainder to B. for life, remainder to C. in tail, &c. a fine levied by B. while A. is in possession, will not devest the remainders, so as to bar them (*g*). The ground of this case is that the continuance of A. in possession is, a continual claim by C., or rather the possession of A. is a continuance of the seisin to C.

Sometimes the fine, instead of operating as a bar by non-claim, will operate in *confirmation* of the title of those who are connected *in privity of estate*, with the person by whom the fine is levied. Therefore, when A. is tenant for life, with remainder to B. for life, with remainder to C. in tail; and C. during the life of A. and while A. is in possession, levies a fine, and, on A.'s death, enters and continues in possession for seven years, before any entry is made by B., this fine will not operate as a bar to B. (*h*), nor is it necessary for him to make any entry to avoid it (*i*).

So if a man has the fee subject to an executory devise, and levies a fine, this fine does not devest the interest of the person intitled under the limitation over. It con-

(*g*) 2 New Rep. 26, cites *Knight* v. *Grenville*, Skin. 262. Co. Litt. 298, a.

(*h*) *Carhampton* v. *Carhampton*, 1 Irish Term Rep. 567. *Focus* v. *Salisbury*, Hard. 400. *Rowe* v. *Power*, 2 New Rep. 1.

(*i*) Ib. and 7 Term Rep. 435.

firms that interest as part of the same seisin or ownership, for the fee and the executory interest are parts only of the same fee-simple.

But a fine levied after the fee had been defeated by the limitation over, would, if levied by the first devisee or his heir, be a fine grounded on an adverse title, and might operate with effect; especially if a feoffment should be made after the determination of the estate, so as clearly to acquire the seisin under a new title; for without a feoffment, it may be doubted whether the continuance of possession by sufferance would be a disseisin to the rightful owner; for after the determination of an estate of freehold, no fee is acquired by continuance of possession, unless there be a feoffment; and even an heir entering as such has been deemed a mere trespasser.

[227] The grounds of the case of *Carhampton* v. *Carhampton*, a case replete with valuable learning, are,

First. In order to render a fine with non-claim a bar to the right of a stranger, the estate of that stranger must be devested and put to a right.

Secondly. Though the latter part of the position is disputed, when understood in the sense of depriving the party, affected by the fine, of recovering his estate by a writ of

entry, and of confining him merely to an action, yet it is agreed, that the estate or interest of the person whose title is meant to be barred, must be so far affected, that he must be deprived of the possession, either before the fine is levied, or by the operation of the fine itself, and a possession inconsistent with his former right must be acquired *(k)*.

Thirdly. The parties were not, *quoad* their estates, mere strangers to each other. They had such privity of estate as enabled them to take benefit, each from the situation and acts of the other. And it was said, that if the possession of the first tenant for life had been devested by the operation of the fine, either standing singly, or connected with any acts preceding the fine, and he had within five years made an actual entry, the possession of the second tenant for life would have been as completely restored, as if he had [228] entered himself, and the bar arising from the non-claim would, as to B., have been as completely prevented. So also as the possession of A. was not affected, nor he put to his actual entry, to gain what he had not lost, the continuance of the possession of A. was, as to the preservation of the right of B. a continuance of the right of B. And lastly, as the circumstances at the time of

(*k*) Butler's Co. Litt. 332, b, n. 1.

levying the fine, were such as prevented him from having the capacity of affecting B.'s right of possession, a possession gained some years afterwards by C. would not give it an operation of which it was not originally capable; for the possession must be displaced as soon as the fine is completed, or not at all.

From the principle of this case, and also from 1 *Cruise*, 253, it is inferred, that if tenant in tail levy a fine, which operates merely to pass a determinable fee, and not to devest the remainder or reversion; in short, whenever the fine operates as *a conveyance*, and not by discontinuance; such fine never can be used as a bar by non-claim against those in remainder or reversion.

But if a disseisor make a lease for life, and afterwards levy a fine with proclamations to a stranger, this fine with non-claim will bar the disseisee, and consequently give stability to the reversion of the disseisor, and, as a consequence, to the estate of the lessee depending on the same title (*l*).

The principle of this case is the same as that of *Carhampton* v. *Carhampton;* it goes, however, one step further, namely, the fine,

(*l*) Jenk. Centuries, 254. Co. Litt. 298. a.

instead of barring the prior estate, connected in privity with the estate of the person who levies the fine, will operate, by way of non-claim, against those who have adverse claims, and thus strengthen the title of the person in possession, as well as of the person who levies the fine.

Twist's case (*m*) belongs to this head, and is to be accounted for and supported on these principles. As dower is merely a right or title, a fine levied by a person claiming under the husband, either as heir, or as a purchaser or assignee, will be a bar to the title of dower.

And although the fine be levied by proclamation, by the husband to a purchaser or assignee, such fine may eventually, by a non-claim after his death, become a bar to the wife; and yet such fine, at the time it was levied, did not devest the title of dower, nor was the possession of the purchaser or assignee, in strictness, inconsistent with the title of the wife to dower (*n*).

It would have been more consistent with principle to have decided that the fine of the husband should not have operated as a bar to the wife, thus rendering it necessary in order to bar the wife, that there should

(*m*) Shep. Touch. 27. Supra 226.

(*n*) Dyer 72 b. pl. 3; 2 Co. 93; 10 Co. 49. *Damport and wife* v. *Wright*, Dyer 224 a, Moor 53.

have been a fine after her right of dower was complete by the death of her husband.

If a fine had been levied by a person who disseised the husband, then it would have been reasonable that the wife should be barred by the fine with proclamation or non-claim during five years after the death of her husband, since her title was disturbed by the disseisin of her husband. While on a conveyance by husband, the purchaser takes the seisin subject to the wife's title of dower, and his seisin is never, as it is under a disseisin, adverse to the title of dower of the wife.

The necessity of adverse possession is also illustrated by the case of *Goodright ex dem. Hare* v. *Board and Jones* (*o*).

In that case the lands were demised to a tenant for twenty-one years, at a yearly rent; and for securing an annuity, A. the reversioner demised the same lands to B. for ninety-nine years, and, in pursuance of an agreement for that purpose, the lands were re-demised to A. by B. for ninety-eight years and eleven months, and afterwards A. sold the lands, and conveyed them by lease and release to Jones in fee, without any notice of the annuity; and Jones being in possession, (for so the case is stated, but *query*,

(*o*) 1 Cruise, 249. See also Com. Dig. *Feoffment*, B. 7. Jones's Rep. 457. 3 Term Rep. 162.

whether he had more than the receipt of the [230]
rents, and from the judgment, it may be collected that he was merely in receipt of the rents collected,) levied a fine with proclamations, and five years having passed, the question was, whether the fine operated as a bar to the title of B. On the ground that the term of B. was not devested or turned to a right, and that it remained after the fine, just as it did before, and on the resolution in *Margaret Podger's* case, 9 Co. 106, *a*, (which Lord Mansfield treated as a general rule in law, founded in good sense, without any exception,) that *no fine or warranty shall bar any estate in possession, reversion, or remainder, which is not put to a right*, it was decided that the term of B. was not barred.

From one part of the judgment delivered by Lord *Mansfield*, he seems to have considered the case of B. as the case of a title to a rent-charge; but to apply the whole judgment to the circumstances of the case, it can be supported only on the grounds that B. could not enter on the lands, the lessee for twenty-one years being in possession; that the possession of the lessee for twenty-one years was the possession of B., as having the reversion for ninety-nine years; that at the time of the conveyance to Jones by A., A. had no adverse possession; and that the [231]

payment of rent to Jones, instead of A. did not devest the estate of B.

From the rule, which requires an adverse possession, or in other words, that the estate should be displaced, or devested, there are to be deduced the following conclusions.

First. a rent-charge, or other collateral interest, or easement, or right, to sue execution under a judgment, cannot be barred by non-claim on a fine (*p*). Nor can an *interesse termini* while it remains such (*q*), in other words, till it gives a present right of entry; nor a condition (*r*), till it operates by giving a right of entry; nor a power, or rather an authority given to executors to sell (*s*), be barred by non-claim on a fine, since in all these instances there is not any adverse possession.

In the first case, notwithstanding the fine, the lands are subject to the charge, easement, judgment, &c. and the possession is not inconsistent with the right to receive the charge, easement, or sue the execution, &c. And in the other instances there is not any estate to be devested; but after an *interesse termini* confers a right of entry, the posses-

(*p*) 5 Rep. 124, a; Shep. T. 22; Cruise on Fines 246.

(*q*) *Saunders* v. *Stanford*, Cro. Jac. 60. 5 Co. 124.

(*r*) Plow. Com. 373.

(*s*) Mo. 605. *Willis* v. *Shorral*, 1 Atk. 474.

sion may be adverse, and non-claim on a fine will run, though the fine be levied before [232] there existed a right of possession under the term (*t*); but, even in this case, it is apprehended, a distinction must be made between a fine by the lessor, and by a stranger: for a fine levied by the lessor, while the interest continues executory, will not run against the lessee; but if a stranger enters adversely, and ousts the person in possession, and levies a fine with proclamations, this fine will run against the term, from the time at which the right of entry accrues. This seems to be the true ground of distinction between *Saffin's case*, 5 Co. 123, *b*, and Cro. Jac. 60; and *Focus* v. *Salisbury*, Hard. 400:—but this point, or the distinction, cannot be relied on.

In *Saffin's* case the fine was levied by the reversioner, after the right of entry under the *interesse termini* commenced; and in *Focus* v. *Salisbury*, the case was decided partly on the ground that the termor was, by express declaration, a trustee for the person who levied the fine.

In the case of an authority to sell, it is observable, there is not any estate till the authority is exercised. The lands are merely subject to that authority. There cannot

(*t*) See Cro. Jac. 60.

be any adverse possession till the authority is exercised, nor till a right of entry exists under an estate given by the authority. In
[233] the mean time, the possession of the person by whom the fine is levied, is perfectly consistent with the right to exercise the authority.

On the same ground, and for the same reasons, non-claim on the fine of a trustee will not bar the title of the *cestui que trust* (*u*); nor will non-claim on the fine of a *mortgagor* (*a*) or *mortgagee* (*b*) bar the right of the other of them.—But if a *cestui que trust* enter, and claim to hold adversely, as against his trustee, (and to do this, he ought regularly to make a feoffment before he levies a fine,) this fine, with non-claim, may become a bar at law to the estate of the trustee: and equity would disturb the legal title only so far as some other person was concerned in interest.

It seems also to be settled, that the fine of one *cestui que trust* may be a bar to another of them (*v*); and that as between two persons claiming to be entitled to an equity of redemption, one of them may be barred

(*u*) Gilb. Ch. 62. *Focus* v. *Salisbury*, Hard. 400.

(*a*) *Weldon* v. *Duke of York*, 1 Vern. 132, 2 Vern. 189.

(*b*) 1 Vent. 132. 1 Lev. 272. 2 Ves. 482.

(*v*) *Basket* v. *Pierce*, 1 Vern. 226. *Clifford* v. *Asbley*, 1 Ch. Ca. 268.

by the fine of the other (*w*). It is also a general and leading rule, that whenever a trustee is barred by the operation of a fine, then, except in cases of fraud, infancy, &c. (*x*) the *cestui que trust* will also be barred: and *Lord Redesdale* has laid down the rule to be, whenever a person comes in by a title, opposite to the title to a trust estate, or comes in under the title to the trust estate for a valuable consideration, without fraud or notice of fraud, or of the trust; a fine and non-claim may be set up as a bar to the claim of a trust (*y*).

With respect to equitable titles, there is another distinction, *first*, where the equity charges the lands only, as is the case, as between a stranger and the *cestui que trust*, a fine and non-claim is a good bar: *secondly*, when it charges the person only, in respect of the lands, as in the case between the trustee and the *cestui que trust*, the fine and non-claim are not a bar (*z*).

In short, any right or title of entry, from whatever cause it arises, may be barred by a fine with non-claim; as a right of entry in trustees for the purpose of raising a sum of money after the birth of a child (*a*). In

(*w*) 2 Freem. 21. 2 Vern. 189.

(*x*) *Alleyn* v. *Sayer*, 2 Vern. 308.

(*y*) Mitford's Pleadings, 203.

(*z*) 1 Ch. Ca. 278; 2 Atk. 390.

(*a*) *Thomasin* v. *Mackworth*, Carter, 75.

that case, it is to be observed, the fine was levied after the right of entry accrued.

So a fine with proclamations may bar a remedy by action, as the right to bring error to avoid a fine (*b*).

It is now to be considered, what persons may be barred by a fine, and non-claim thereon, and the times at which the bar will be complete.

Generally speaking, all persons who have an absolute estate, and all corporations who have an absolute ownership, conferring an unlimited power of alienation (*c*), may be barred by non-claim on a fine. In some cases, the bar will be partial, so as to operate only against the owner for the time being, by reason of his own non-claim (*d*).

In the first place, it is apprehended, the king (*e*) cannot be barred by non-claim on a fine. Nor can *ecclesiastical corporations*, aggregate or sole, *quasi* corporations (*f*), be barred by non-claim on a fine. But ecclesiastical *persons* (*g*), being sole corporations,

(*b*) *Bartholomew* v. *Belfield*, Cro. J. 332.
(*c*) *Croft* v. *Howell*, Plow. 536.
(*d*) 11 Co. 78. b.
(*e*) Co. Litt. 90; 1 Bl. Com. 247; 3 Inst. 188.
(*f*) 1 Eliz. c. 19. 13 Eliz. c. 10. 1 Jac. 1. c. 3. *Magdalen College* case, 11 Co. 78. b.
(*g*) Shep. Touch. 21; *Croft* v. *Howel*, Plow. 538.

may be barred, in respect of their ownership, by their non-claim, as in the case of a bishop, parson, or vicar: and each *successor* will also be barred, unless he avoids the fine within five years after his title accrues (*h*): also the head of a corporation aggregate of many (*i*), may be barred by his non-claim on a fine, and by that means the remedy of the corporation may be suspended, while he continues the head of the corporation.

The same rule applies to lands annexed [236] to offices for life, and fines levied of such lands. The officer for the time being may be barred by five years non-claim. The non-claim however of one officer will not bar or conclude his successor (*j*).

It follows that no title, depending on non-claim, can ever be good, as against an ecclesiastical corporation, aggregate or sole, if the title *depend merely on a fine and non-claim:* though in the case of such corporation a good title may be gained, while the particular person, being a sole corporation, continues to represent the corporation; or the head of a corporation, aggregate of many, by whom there has been five years

(*h*) *Croft* v. *Howel*, Plow. 538.

(*i*) *Stowel* v. *Zouch*, ibid. 375. b. *Magdalen College* case, 11 Co. 78, b. *Howlett* v. *Carpenter*, Ventr. 311.

(*j*) Plowd. 538.

non-claim, remains at the head of the corporation.

But a title may, it is submitted, become good under the general *statutes of limitation*; since in these statutes there is not, either in fact, or in principle, any saving for the successor. The successor is without remedy, unless he can show a seisin within the limited period.

Secondly. All persons, except infants, persons of unsound mind, women under coverture, persons out of the realm, and persons in prison *at the time of the last proclamation made*, and also, except persons who have not a present right of entry, are bound to avoid the fine within five years after the last proclamation made.

And persons who are infants, &c. are bound to avoid the fine within five years after their disabilities are removed; and per-
[237] sons who have not a present right of entry, or claim, are bound to make entry or claim within five years after their right of entry or claim arises; unless they labour under disabilities, and in that case, within five years after their disabilities are removed. And if several persons have severally present rights, as *termor* for years, and *freeholder*, *lord* and *copyholder* (*k*), it has been said the

(*k*) Co. Copyh. s. 55; 9 Co. 105, b; Plowd. 374.

fine will run against each at the same time. But this distinction is now exploded (*l*).

When several persons are joint-tenants, co-parceners, or tenants in common, the fine may run as against those who are free from disabilities, and in respect of their shares, although its operation be suspended as against such of them as labour under disabilities, and for their shares (*m*).

In all cases, when a person claims in opposition to a fine, it becomes necessary to consider *at what time* his right of entry, &c. commenced, unless that person laboured at the time his right commenced, under one of the disabilities mentioned in the statute. As soon as it shall be ascertained that any such disability existed at the time when the right of entry commenced, the [238] next inquiry should be, at what time the disability ceased.

In case of persons having immediate rights, the fine begins to run *from the last proclamation* on the fine.

From these observations, several conclusions may be drawn, and the observations may be illustrated by their appropriate cases.

First. No one is bound to enter, &c. till

(*l*) Bac. Abr. *Remainder* G. p. 830. *Whaley* v. *Tankard*, 2 Lev. 52, 1 Vent. 241, 2 Vent. 234. *Brandlyn* v. *Ord*, 1 Atk. 571.

(*m*) *Roe* v. *Rowlston*, 2 Taunt. 441.

his right of entry, &c. commences. And therefore non-claim on a fine does not run against a person who has an *interesse termini*, till the time at which the right to enter under the term arrives (*n*).—So if there be a term, and the ownership of that term be, at the time when the last proclamation is made, or the right accrues (*o*), vacant, for want of letters of administration of the effects of the last owner, no right of entry exists till letters of administration are obtained.—Till that time there is not any adverse possession, or any existing right; and till there is an existing right, no entry is necessary, or indeed could be made with effect.

Again, when there is an estate in remainder or reversion, after an estate of freehold, or even for years (*p*), the fine will not begin to run against the owner of the remainder
[239] or reversion, till the time arrives, at which this estate is to give a right to the possession (*q*).

So if tenant in tail aliens, so as to discontinue (*r*) or devest (*s*) the estate-tail, and his

(*n*) *Saffyn's* case, 5 Co. 123. Cro. Jac. 60.

(*o*) *Sanders* v. *Standford*, cited Cro. Jac. 61.

(*p*) *Laund* v. *Tucker*, Cro. Eliz. 254. *Brandlyn* v. *Ord*, 1 Atk. 571. *Whaley* v. *Tankard*, 2 Lev. 52. Ventr. 241. 2 Vent. 334.

(*q*) Plowd. 374.

(*r*) 3 Co. 87, a & b.

(*s*) *Penyston* v. *Lyster*, Cro. Eliz. 896.

alienee levies a fine with proclamations ; or the issue in tail accepts rent (*t*) reserved on a rightful conveyance made by tenant in tail ; and *afterwards* a fine is levied by the owner who claims under that conveyance ; in the first instance, during the life of the tenant in tail by whom the conveyance is made, and in the second instance, during the life of the issue by whom the rent is accepted, there is not any person by whom the fine can be avoided. For this reason, the operation of the fine, as a bar by non-claim, will commence in the former case, on the death of the tenant in tail, by whom the conveyance is made, and in the latter case, on the death of the issue, by whom the rent is accepted. It is observable, that when the fine is levied, there is not any *adverse possession*. There is, however, an *adverse title quoad* the future issue, and this seems to have been allowed sufficient to call the fine into operation against them ; and so far there is a qualification of the general rule, which requires the posses-[240] sion to be adverse when the fine is levied.

It is also to be remarked, that when *two rights* exist in the same person, for *distinct causes ;* as in the instance of a person who has a remainder or reversion in fee, after an estate for life, forfeited by a fine levied ; the

(*t*) Shep. Touch. 31.

entry to avoid the fine may be made, either within five years after the fine is levied, on the ground of forfeiture, or within five years after the death of the tenant for life, on the ground that his estate is determined (*u*).

But when there are several remedies for one right, as in the instance of a discontinuance for a life or lives, with a subsequent alienation of the reversion in fee by fine with proclamation, the persons in remainder or reversion must avoid the fine within five years after the right first accrues, *Sawle* v. *Clearke* (*a*). And yet if no fine had been levied, a bar by the statute of limitations, 21 James I. of the remedy by formedon would not have been any bar to the right of entry by reason of the estate-tail or remainders, when the discontinuance ceased by the determination of the lives, (being the estate for which the discontinuance was originally made.) *Hunt* v. *Bour* (*b*).

And observe 1st, That a discontinuance may be enlarged by warranty, as in Littleton, and *Sawle* v. *Clearke*.

And on the other hand, 2dly, A discontinuance may cease by the surrender, merger, or entry, for a forfeiture of the particular estate, during which the discontinu-

(*u*) *Whaley* v. *Tankard*, 2 Lev. 52, Ventr. 241, 2 Vent. 333.
3 Co. 78, b. Bac. Ab. Rem. 850.
Goodright v. *Forrester*, 8 East. 552, 1 Taunt. 578.
(*a*) Sir William Jones, 208.
(*b*) 1 Br. Parl. cas. 48.

ance was affected. So the discontinuance may be enlarged by the tortious alienation, as an alienation by feoffment or fine of the particular tenant, claiming under the discontinuance.

So when there are in the same person distinct rights of entry, under *distinct* estates, or distinct titles (*v*), the owner may enter, so as to save his more remote estate, when the time arrives at which that estate is to confer a right to the possession, although he neglected to enter to save his right, under the more immediate estate (*w*). This is more particularly important, in the case of titles depending on cross remainders, since the right may, in that case, exist under some of the remainders, though it be barred as to others of them.

A tenant in tail demises for years, and then conveys in fee, and a fine is levied by the alienee. It will deserve consideration whether the issue have two periods of claim; one after the term, as well as one during the term (*x*). It may be contended they have the two periods for claim: the first

(*v*) Shep. Touch. 32.

(*w*) See Plowd. 372; and query if the person who has the present right, and is barred, can claim under the more remote estate. *Catline* and *Weston*, J. denied that he can make any claim under the more remote estate. Mr. *Cruise* thinks he may; but the case he puts is not full in point. See *Cruise on Fines*, p. 214.

(*x*) See Co. Litt. 298 a; *Salvin* v. *Clerk*, Cro. Car. 155.

on the ground that they are not bound by the term, the second on the ground that the heirs have a right to enter on the determination of the term. This case is distinguishable from *Salvin* v. *Clerk*. In that case the estate for life caused a discontinuance ; and the reversioner had only one title, and one period for avoiding the fine.

[241] The point now under discussion is equally applicable, when the same person has two *distinct estates ;* as in tail, and in fee ; or for life and in fee.

Secondly. If the right devolve on an infant, or other person under disability, it is sufficient that he enter within five years after his disabilities are removed (*y*). But if there are several disabilities, existing in the same person, at one and the same time(*z*), or there are several disabilities arising at different periods, and one of them succeeds the other without any interval, (as is the case of infancy and imprisonment, or infancy and marriage (*a*), and consequently coverture during infancy,) the fine will not run while any one of these disabilities continues. Or if there be a *succession* of disabilities in distinct persons, having successive rights, under the *same estate*, as in the

(*y*) Stat. 7 Hen. IV. c. 24. sec. 5.

(*z*) Plowd. 375.

(*a*) *Hulm* v. *Heylock*, Cro. Jac. 200.

case of an ancestor and heir, the fine will not run against the ancestor or the heir, while any disability continues. But though the fine never began to run against the ancestor, by reason of his death, while labouring under some disability, it may, notwithstanding the doubt formerly entertained on this point (*b*), begin to run against the heir, if adult, &c. at all events from the time at which his disabilities, if any, cease (*c*).

Thirdly. Whenever a fine begins to run against a person, it will continue to run [242] against him, and in case of estates of inheritance, either in fee, or in tail, &c. against his heirs, and in case of chattel interests, &c. against his executors, &c. notwithstanding any subsequent disability (*d*). And, therefore, if the five years commence against a person who is adult, &c. they will continue to run against that person, though he becomes imprisoned, insane, &c.; and though he dies either free from any disability, or under a disability, leaving for his heir, issue, or personal representative, a person who is either an infant, under coverture, insane, or imprisoned, or though he dies intestate, and *no letters of administra-*

(*b*) *Cotton's* case, 2 Inst. 519. 1 Lev. 211.

(*c*) *Dillon* v. *Leman*, 2 H. Black. 584.

(*d*) *Doe* v. *Jones*, 4 T. Rep. 301. *Stowell* v. *Zouch*, Plow. 356.

tion are taken, the five years non-claim will continue to run.

It follows, that in investigating a title, depending upon non-claim, the first inquiry to be made, is for the time at which the right of entry, &c. commenced ; the second, whether the person then intitled to enter, had a particular estate, or an estate in fee-simple ; thirdly, whether he at that time laboured under any disability ; and if he did, then, fourthly, at what time that dis-
[243] ability ceased ; and if the person died under a disability, then, fifthly, whether the right devolved on a person who, at that time, was adult, &c. or laboured under some disability ; and if so, then, sixthly, at what time that disability ceased, and so on. And if the person against whom a fine has run, had only a particular estate, the inquiry must be extended still further. First, to ascertain whether the particular estate is determined ; and if it be determined, then to whom the remainder, &c. belonged ; and whether that person at the time when his right, under the remainder, &c. commenced, laboured under any disability of asserting his claim : and so on, *mutatis mutandis*, till it can be shown that each person who had any estate, either under the first or any other more remote estate, has suffered the statute of non-claim to run against his title, and

bar the same. Till this can be shown the title will be defective.

Sometimes, however, by calling in the aid of a tenant in tail, or the heir in tail, so as to obtain his concurrence, as vouchee in a common recovery, this person, though barred by the operation of the statute of non-claim, may enable the person in possession to make a good title against those who have any right existing, under more remote estates, either in remainder or reversion (*e*).

Sometimes one of the statutes of limita- [244]
tion, and the statute of non-claim on a fine, may, at the same time, be running against the same claimant; and if he be barred by either means, it is sufficient.

In general the fine will cause the bar, as the bar under the fine is complete in five years from the time the fine begins to run. The bar is always effected by the fine, when the fine and the statute of limitations begin to run from the same period. It may sometimes happen that the bar under the statute of limitations is complete, before the fine begins to run, or at least before the bar under the fine is accomplished. Thus suppose A. is tenant in tail and free from disabilities, and the statute of limitations begins to run against him, and he then dies,

(*e*) Supra, 126. 139.

leaving an infant of the age of one year, and a fine is levied with proclamations. The fine will not begin to run against the infant until he be of age, but the statute will continue to run notwithstanding the minority of the issue. So also the statute of limitations may have run for a given time, say sixteen years or upwards, so as to effect a bar before the five years, under the statute of non-claim, shall be complete.

No title requires a more minute investigation than a title depending on non-claim.

Whoever deduces a title, and relies on a fine and non-claim as its support, must be
[245] prepared to show by clear and distinct evidence, that the fine has performed its office, of bar, by non-claim, against all persons who might have claimed in opposition to the fine.

Whoever, therefore, levies a fine with an intent to gain a title by non-claim, should endeavour, by all means in his power, to ascertain the persons who are to be affected by the operation of the fine; that he may be able to show at what time the fine has completed the title, under the statute of non-claim.

These observations are applicable only as between a purchaser and seller. As between adverse parties, the person who claims in opposition to the fine, must adduce evi-

dence, to bring himself within the exception of the statute; so as to save himself from the bar of the statute. In short, the burthen of the proof lies on him. The fine is presumptively a bar after five years non-claim, till the contrary shall be shown.

Before a right is asserted in opposition to a fine, it is proper to consider very attentively, whether the claimant has a right to avoid the fine, merely by *entry*, or by *action*.

In all cases, it is apprehended, (except two, namely, 1st, a discontinuance by the alienation of tenant in tail, either by force of the alienation, or by reason of a warranty; or, 2dly, a descent which tolls entry,) the [246] claimant may enter. In the case of a discontinuance (*f*), or a descent which tolls entry (*g*), he cannot enter. He is driven to his real action. And as the claimant is now bound (*h*) to prosecute his entry or his claim, within one year after his entry or claim is made, (unless he can make a new entry or claim within five years, for this is the construction of the statute,) he may, by mistaking his remedy, as by making an entry and prosecuting an ejectment, instead of bringing his real action, lose his right: for if he should enter towards the end of the five years, and be non-suited in his ejectment,

(*f*) Litt. s. 592, 596.
(*g*) Ibid. s. 385.
(*h*) 4 Anne, c. 16, s. 16.

on the ground that he had merely a right of action, and, not a right of entry ; and the five years should elapse before the non-suit, he might, unless he shall take the precautions which are recommended, be deprived of all remedy, since his claim made and action brought, after the five years are expired, will be too late.

In all doubtful cases, therefore, the party should prefer a real action to an ejectment; or if he bring an ejectment, as the more easy remedy, he should also make his claim, and within the year prosecute his real action.

[247] No fine with proclamations, which requires to be avoided by entry, can be *avoided* without an actual entry, and this is the only case in which an actual entry (*i*) is now requisite. That an entry may be effectual to avoid a fine, it must be made for that *expressed and declared purpose* (*j*).

It is not universally true that a fine with proclamations cannot be avoided without an actual entry. The rule is, merely, that when a fine *with proclamations* is levied, and there is a right of entry, no ejectment can be maintained, without an actual entry to avoid the fine, and the demise in the ejectment

(*i*) *Berrington* v. *Parkhurst*, 2 Str. 1085, 4 Bro. P. C. 58.

(*j*) *Clerke* v. *Powell*. 1 Saund. 319. Williams's note. 1 Mod. 10.

must be laid on some day *subsequent to the entry*.

A fine with proclamations must be avoided by an actual entry, as the means of laying a foundation for an ejectment; while a fine at the common law may be avoided without an actual entry, and the confession of lease, entry and ouster will be sufficient (*k*). In one case the statute has application so as to make a lawful, that is an actual, entry absolutely necessary. In the other case the statute is irrelevant, and the rules of the common law, as modified by modern practice, supersede the necessity of an actual entry.

But though lease, entry and ouster are confessed, there are three instances, in which the confession does not preclude the right of the defendant to dispute the competency of the remedy by ejectment; for

1st. When a fine with proclamations is levied, and the seisin is *devested*, (for this is essential,) the defendant may put the plaintiff to prove an actual entry, before the day of the demise laid in the ejectment.

2dly. When the entry is tolled by descent; or

3dly. When there is a discontinuance, so that a real action, and not an ejectment, is the proper remedy, the defendant may non-

(*k*) Supra, 213.

suit the plaintiff in the ejectment, on the ground that no ejectment lies. And yet the confession of lease, entry and ouster, if carried to its utmost extent, would enable the parties to try the mere question of title, since the confession of the lease is the admission, in strictness, of an *actual seisin* in the plaintiff's lessors.

And no one, except the person who is the owner of the reversion when the fine is levied, or his heir, can take advantage of a forfeiture incurred by levying the fine. The right of entry for the forfeiture cannot be transferred to an assignee (*l*).

And if an entry made by the person entitled to a particular estate is effectually made and prosecuted with success, so as to avoid the fine as against himself; his entry, (with the exception of an entry by tenant for years, when the persons entitled in remainder or reversion have only a *right of action* (*m*)—), will restore the seisin of all persons in remainder or reversion, expectant on his estate. Of consequence no bar by non-claim can ever be set up under the same fine: but the persons in remainder or reversion may, when their estates become estates in possession, enter as if no fine had been levied (*n*).

(*l*) *Fenn* v. *Smart*, 12 East, 444.

(*m*) Litt. s. 411, Hawk. Co. Litt. 337.

(*n*) Williams's notes to 1 Saund. 319.

In regard to *actions to avoid a fine*, it is sufficient that the action shall be commenced within the five years, although judgment be not obtained till a subsequent period. The action must be prosecuted with effect, or a new action brought within the five years: for if an action be brought and dis- [248] continued, and the five years elapse before another action is brought, the non-claim will be a bar.

Let it be remembered that an entry or action is necessary only when a title is legal.—In cases of fines levied of trust estates, the fine, as against the *cestui que trust*, must be avoided by a bill in equity: at least, unless the legal effect of the fine be avoided by the entry or action of the trustee; and if the trust affects the *land* and not the *person*, the proper remedy is an entry or action by or in the name of the trustee. But on this point query, and see 1 Cruise, 303.

So the fine itself may be avoided for error in the fine: and if the fine be avoided, the proclamations, and consequently the operation of the fine, as a bar by non-claim will be also avoided.

So if there is any irregularity in the proclamations, though the fine remains in force, (*o*) it cannot have any effect under the statute of non-claim.

(*o*) Dyer 182 b, 216 a.

And in the case of a fine levied in Westminster-hall, of lands in ancient demesne, the fine may be avoided by writ of disceit.
[249] On the rule propounded by Lord Bacon, "*non potest adduci exceptio ejusdem rei cujus* "*petitur dissolutio,*" no non-claim will run against the lord upon this particular fine (*p*); but under a second fine levied of these lands in the court at Westminster, with proclamations, non-claim for five years will bar the lord of his remedy by a writ of disceit (*q*).

A fine to be avoided by a writ of error is merely voidable; while a fine levied in a court which has no jurisdiction (as in the case of a fine levied in the court of Westminster of lands within a peculiar jurisdiction, as a county Palatine, &c.) is actually void (*r*). And a fine which is actually void (*s*) can never be a bar by non-claim, nor is an entry or claim necessary on account of the fine.

It remains only to be observed, that care should be taken to see that the proclamations appear regular on the record, and pursuant to the statute. As the proclamations can be made only under the statute, a fine levied in some courts, as courts of *ancient demesne*, &c. cannot be proclaimed, and,

(*p*) Plowd. 370, b. *Cockman* v. *Farrer*, T. Raym. 461. *Zouch* v. *Thompson*, 1 Lord Raym. 177.

(*q*) See Plowd. 370, b. in margin; Owen 21, Bac. Law Tr. 39. 2 Inst. 518; T. Raym. 462.

(*r*) 4 Inst. 205, 223.

(*s*) 2 Inst. 518, 523.

as a consequence, they cannot operate either by non-claim, or as a bar to the issue in tail. (*t*). [250]

In the observations already offered on fines, a summary view has been taken of this important learning. The student is recommended to pursue the subject in those books which are written professedly on this assurance, including the chapter on *fines* in *Sheppard's Touchstone*.

With a view to the immediate business of the practical conveyancer, the following points will be considered:

1.—By whom (*u*)}
2.—To whom (*v*)} a fine may be levied.
3.—In what court (*w*).
4.—On what writs (*x*).
5.—Of what parcels (*y*).
6.—By what names (*z*).
7.—The parts of a fine (*a*).
8.—At what time a fine is complete.

First, As a conveyance (*b*).

Secondly, As operating under the statute of proclamations, either as a bar to issue in tail, or by non-claim (*c*).

(*t*) *Hunt* v. *Bourne*, 1 Salk. 339.
(*u*) Infra, 251.
(*v*) Infra, 265.
(*w*) Infra, 266.
(*x*) Infra, 268.
(*y*) Infra, 269.
(*z*) Infra, 270.
(*a*) Infra, 273.
(*b*) Infra, 291.
(*c*) Infra, 295.

9.—The difference between a fine, as

First, A conveyance (*d*).

[251] *Secondly*, An estoppel (*e*).

Thirdly, A bar to issue in tail (*f*).

Fourthly, A bar under the statutes of non-claim (*g*).

10.—On what fines uses may be declared (*h*).

11.—By whom the uses of a fine may be declared (*i*).

12.—Of resulting uses (*j*).

13.—Of deeds leading; and

14.—Of deeds declaring the uses of a fine (*k*).

1. *By whom a Fine may be levied.*

With the exception of the king, and corporations aggregate of many, a fine may be levied by all persons either alone or jointly with others; even infants, idiots, and married women, may levy fines. Infants or idiots ought not, however, to be permitted to levy a fine, (with the exception of an infant who is a trustee within the provisions of the 7 Anne, c. 19.—(*l*)—); but, having levied a fine, it will be good (*m*):

(*d*) Infra, 298.
(*e*) Infra, 301.
(*f*) Infra, 306.
(*g*) Infra, 309.
(*h*) Infra, 310.
(*i*) Infra, 311.
(*j*) Infra, 316.
(*k*) Infra, Vol. II.
(*l*) *Ex parte Mair*, 3 Atk. 479.
(*m*) *Cavendish* v. *Worsley*, cited 12 Co. 133.

with the saving that an infant may, during his minority, reverse a fine levied by him while an infant (*n*). The trial of infancy must be by *inspection* of the judges of the court in which the fine is levied; but the [252] court will receive evidence, by examination of witnesses, as the godfather and godmother (*o*), church books, &c. (*p*), to assist their judgment. And if the inspection take place during the minority, the reversal founded on that inspection may be subsequent to the period of majority (*q*): and it may be at the instance of the party himself or his *heir;* and by the heir, notwithstanding the conusor dies during minority. To secure to the infant the benefit of his non-age, the inspection may be recorded before the fine is engrossed (*a*).

In case an infant becomes adult, or dies before inspection, the heir is without remedy (*r*).

The fine of idiots is also binding on them and their heirs. There are not any legal means of avoiding this fine. Although the conusor in the fine be found to have been an idiot, *a nativitate* (*s*), the fine will be deemed good at law. It is immaterial also

(*n*) 17 Ass. 17; 2 Roll. Abr. 15; *Anne Hungate's case*, 12 Co. 122.
(*o*) Bro. Ab. *Error*, pl. 60.
(*p*) 2 R. Abr. 573. *Anne Hungate's case*, 12 Co. 122.
(*q*) Co. Litt. 131. *Kekewich's* case.
(*a*) Moore, 173.
(*r*) 2 R. Ab. 15. 12 Co. 122.
(*s*) *Mansfield's case*, 12 Co. 123.

whether the fine is obtained from an idiot, or from a person under a temporary deprivation of intellect. The law is the same with regard to those who have lost their
[253] understanding, as to natural idiots who never had any (*t*).

In some cases (*u*) equity has relieved by decreeing a *re-conveyance*. In another case it relieved against a fine levied upon a possession obtained under a *forged* deed (*v*). And Lord *Hardwicke* observed though a fine has been levied, yet if it has been under circumstances of fraud, the court ought to prevent the stealing away an estate in this manner (*w*).

Persons who are born deaf, dumb, and blind (*x*), are in the same predicament with idiots. Persons deprived of only one or two senses, and who could express their meaning by writing, or signs, have been allowed to be competent to levy fines (*y*).

Nor can *duress of imprisonment*, or the like, be alleged at law as an answer to the operation of a fine (*z*).

The rule of court (*a*), which requires an affidavit of one of the commissioners, before
[254] whom a fine is acknowledged, that the par-

(*t*) 4 Co. 124.
(*u*) 2 Vern. 678.
(*v*) *Cartwright* v. *Pultney*, 2 Atk. 281.
(*w*) *Baker* v. *Pritchard*, *alias Hosier*, 2 Atk. 387.
(*x*) Co. Litt. 42, b.
(*y*) *Elliott's case*, Carter, 53.
(*z*) Chetwynd on Fines, 49. 2 Inst. 483, Shep. Touch. 6.
(*a*) Hil. 17 Geo. II.

ties are of age, and competent understanding, has given great protection against the frauds formerly practised, in obtaining fines from minors, &c.

A fine by a *married woman* alone, without the concurrence of her husband, ought not to be received, except, perhaps, under peculiar circumstances, as where her husband is banished for *life*; or as in *Moreau's* case (*b*), where the husband had sold, and he covenanted that he and his wife, when of age, should levy a fine. She attained her age of 21; and at first refused to levy the fine. Her husband afterwards went abroad, and then she consented to levy the fine; and her acknowledgment, as a *feme sole*, was received by the Chief Justice of the Common Pleas. This fine was levied without prejudice to the husband's right to avoid the same. In short, the court could not by any means preclude his right to question the validity of the fine. All the Chief Justice did, was to enable the wife to bind herself, by receiving the fine from her, as if she had been a *feme sole*.

So a fine from a married woman alone was allowed to pass, because the husband and wife had conveyed, and the purchase

(*b*) 2 Blackst. Rep. 1205.

money was paid, and the husband afterwards became *non compos mentis* (*c*).

In *Mrs. Abney's* case the husband had become bankrupt, and had absconded from his creditors; she levied a fine as a *feme sole*, and the court, on an application, refused an order that the fine should pass, but *Mr. Justice Heath* gave his *allocatur* to the fine.

The affidavit of acknowledgment was made by one of the commissioners, and had these additional clauses. "And this depo-
"nent, the said W. A., further saith, that
"he verily believes the said E. A. is not a
"single woman, but the wife of R. A. late
"of &c. brickmaker, dealer and chap-
"man; and that a commission of bankrupt,
"under the great seal of the United King-
"dom, bearing date at Westminster, the
"9th day of August, 1805, was duly issued
"against the said R. A., and that he was
"thereupon found and declared a bank-
"rupt; and that he, this deponent, has
"been informed, and believes, that the
"said R. A. never surrendered himself
"under the said commission, but abscond-
"ed, and fled beyond the seas, to some
"part of North America. And this depo-
"nent further saith, that the said E. A., at

(*c*) *Stead* v. *Izard*, New Rep. 312.

" the time of acknowledging the said fine,
" stated to this deponent and the said
" S. W., that by reason of the before-men-
" tioned situation of the said R. A. her
" husband, she was desirous, and intended
" to acknowledge the said fine, and pass the
" premises therein comprised, as a feme
" sole; and that this deponent and the
" said S. W. took her acknowledgment
" provisionally, and subject to the opinion
" and direction of this honourable court,
" whether or not the same ought to be
" allowed to pass."

Though a married woman ought not to be allowed to levy a fine, unless her husband [255] joins as a party; yet if she levy a fine as if she were a *feme sole*, in other words, without disclosing by the record, that she is under coverture, this fine will be good against her and her heirs (*d*), unless it shall be avoided by her husband. He may avoid it during coverture. When avoided by him during coverture, the fine will be also avoided against the wife and her heirs (*e*); and it is said, a husband entitled to be tenant by the curtesy may, *pro interesse suo*, avoid a fine, even after the death of his wife.

And when it appears by the record, that

(*d*) Co. Litt. 46, a; 2 Roll. Ab. 20; Perk, s. 20; Shep. T. 7.

(*e*) Co. Litt. 46, a.

a fine is levied by a married woman, for example, by *A. the wife of B.*, without the concurrence of her husband, this fine will be voidable for error, apparent on the record. It may be avoided accordingly, even by the wife or her heirs. Under these circumstances her fine is said to be merely void (*f*). And if a fine *executory* shall be levied by a woman as a *feme sole*, and execution be sued against husband and wife, and she be received for his default, she may defeat the fine, by showing her coverture.
[256] It is said, this is for the benefit of her husband (*g*).

Marriage by a woman after she has acknowledged a fine, will not avoid the fine. It may be made out in her name as a *feme sole* (*h*).

And a fine levied by a husband and wife will remain in force, notwithstanding the marriage between them should be dissolved by a divorce (*i*).

It is observable, that as fines are binding on idiots, &c. ; and also on infants, unless avoided during minority ; and by married women, unless avoided during coverture ; deeds executed by them declaring the uses of these fines are also supported. So long

(*f*) Siderf. 122.
(*g*) Co. Reading. 7 Co. Litt. 353.
(*h*) Shep. T. 18.
(*i*) 2 Ro. Abr. 20.

as the fine, which is the principal, remains in force, the deed of uses, which is only the accessary, will continue to be effectual (*j*).

Particular persons by whom fines may be levied, and whom it will be proper to notice, are

The *queen* (*k*), whether sole or consort, except a queen regent.

Sole corporations (*l*). And though *ecclesiastical persons* (*m*) are restrained from [257] alienation, their fines are good against themselves (*n*), and voidable only and not void as against their successors (*o*).

Persons attainted of treason or felony (*p*), may levy fines to bind themselves and their heirs, not the king or lord. So a fine by an *alien* will be good as against all persons except the king; and against him till office found (*q*). Also persons outlawed in personal actions may levy fines.

Particular persons by whom fines cannot be levied, are,

First, The *King* (*r*). The reason is because no writ of covenant can be brought against him. When he is conusee in a fine,

(*j*) *Mansfield's* case, 12 Co. 123. 2 Co. 58. 10 Co. 42, b.

(*k*) Co. Litt. 3, 133 a: Densh on Fines, 12.

(*l*) Co. Read. 7, 8.

(*m*) 1 Eliz. c. 19. 13 Eliz. c. 10.

(*n*) Co. Litt. 45 a. Supra, 235.

(*o*) *Magdalen College* case, 11 Co. 78, b.

(*p*) Shep. T. 6; 8 Assize, pl. 25, West. Symb. s. 13.

(*q*) Densh Read. on Fines, 13; Co. Read. s. 17.

(*r*) 7 Co. 32. Cro. Car. 96, 97.

he may render the lands, and thus indirectly levy a fine. By statute law he is now restrained from alienation, otherwise than for a limited period, and in particular cases.

Secondly. Corporations agregate of many (*s*). But according to 1 Leon. 184, corpo-
[258] rations of this description may levy a fine by attorney.

This is contrary to Lord *Coke's* opinion in his Readings. He observes, that the statute *de modo levandi fines* requires that the parties to a fine should *appear* personally before the judges. These observations apply to the persons, &c. by whom fines may be levied, in respect of personal or political qualifications.

It is also to be considered, by whom a fine may, or may not, be levied, in *point of estate*, and to what extent, in respect of share.

First That a fine may be free from the objection, that *partes finis nihil habuerunt*, there must be an estate of freehold in one of the parties (*t*). Whether it be in the conusor or conusee is of no material consequence. And whether this estate be of inheritance, or merely of freehold (*u*); and, when of

(*s*) Co. Read. 7.
(*t*) 3 Wils. 249; Dyer, 215; 2 Inst. 523; 5 Co. 123.
(*u*) *Focus* v. *Salisbury*, Hard. 401; *Davies'* case. Dyer, 3, b. in a note.

freehold, whether it be of a superior or inferior degree ; and whether it be by right or wrong ; and notwithstanding it be grounded on a defeasible title (*v*) ; and whether the estate of freehold be in possession, or in reversion, or remainder (*w*) ;—is of no con-[259] sequence. Indeed, a fine by a remainderman, or reversioner, though it cannot bar the tenant of the prior estate, while he continues in the seisin, may bar strangers, and operate for the benefit of the tenants of the prior estate (*x*).

As between the parties, and also privies, such as heirs and issue in tail, a fine will be good, although the freehold is not in either of the parties (*y*). But as against strangers, in other words, the rightful owners, and as a bar by non-claim, the fine may be avoided by this plea.

This is considered as a disability from want of *sufficient estate.* It is rather a disability to levy a fine for a particular purpose, than a positive and absolute incapacity A fine levied, under the circumstances that the freehold is not in either of the parties, has, in truth, no operation on the freehold. It cannot amount to a convey-

(*v*) *Carter* v. *Barnardiston*, 1 P. W. 515.

(*w*) Jenk. Cent. 254. Supra, 229.

(*x*) *Twist's* case, Shep. Touch. 27. Co. Litt. 298, a. Jenk. Cent. 254.

(*y*) *Grant's* case, 10 Co. 50 ; *Johnson* v. *Bellamy*, 2 Leo. 36 ; Jenk. Cent. 274.

ance, because there is not any estate in the parties to be conveyed. If levied by a mere stranger, it cannot pass any estate, though it may operate by conclusion and as an es-
[260] toppel; and if levied by tenant for years, or by a copyholder, it is a forfeiture of his interest.

The persons disqualified, in point of estate, from levying a fine, are,

First. Persons having chattel interests (*z*); as,

Termors for years.

Tenants for uncertain interests, as till debts are paid.

Tenants by statute merchant.

——————— staple.

——————— elegit.

Tenants at will.

Secondly. Copyholders (*a*).

The fines of all these persons are good as against themselves, by way of estoppel. These fines, however, have no operation to carve out a title by non-claim grounded on the fine. They do not operate even as a *conveyance* of their respective estates, but as an extinguishment of them. That a termor, or a copyholder, may, by means of a fine, acquire the fee by non-claim, a feoffment should be made to gain the freehold, and the fine be levied at a subsequent

(*z*) 3 Co. 77. (*a*) Co. Copyh. s. 55.

period (*b*), and as of a term *subsequent* to, and not preceding the feoffment, and so that it may appear from the record that the fine was preceded in date, (measured by the return of the writ,) by the date of the feoffment. When a fine is preceded by a feoffment, the fine will be free from the objection that *partes finis nihil habuerunt:* [261] for the estate of freehold is acquired by the forcible operation of the livery of seisin.

When a person has merely *a right of action*, or a title of entry (*c*), or a contingent interest (*d*), he is not in a situation to levy a fine, so as to make a *conveyance*. His fine, if levied to a stranger, will be void as a conveyance, since *partes nihil habuerunt;* if levied to the person in possession, it will operate as a release of right; and if levied to a stranger, the person in possession may take advantage of it as an estoppel against the conusor, and by that means it will amount to a virtual release, or rather conclusion of his title (*e*). For this reason, a person having such right or title, should take care, by entry or action, to restore his

(*b*) Co. Copyh. s. 55; *Margaret Podger's* case, 9 Co. 104.

Focus v. *Salisbury*, Hardr. 401.

(*c*) *Buckler's* case, 2 Co. 55. *Ward* v. *Mathew*, alias *Wal-thew*, Noy, 123. Cro. J. 175; 3 Co. 90 a; Supra 208.

(*d*) *Grant's* case, 10 Co. 50. 3 Lev. 227.

(*e*) *Buckler's* case, 2 Co. 55. Palm. 365; *Weale* v. *Lower*, Pollexfen, 55.

seisin before he levies a fine, except in those instances in which it is his intention to extinguish such his right or title. Persons having contingent interests should also cautiously refrain from levying a fine which imports a grant in fee, unless they mean to extinguish these interests. They may levy
[262] fines which give a particular interest, as for years. When the intention is to create a particular interest, a fine for years will attain the end, and such fine, though it will bind the interest when vested, will not conclude the title to the fee (*f*).

So *cestui que trusts* have no freehold at law: they have a freehold in equity. A fine by a *cestui que trust* (*g*) will, as against the heirs and issue in tail, have the same operation in equity as the fine would have had on their estates, if they had been legal and the *cestui que trust* had had the legal estate; with the exception only that a fine by a *cestui que trust* will not, it is apprehended, operate as a discontinuance against persons in reversion or remainder, so as to render their interests unalienable. The doctrine of discontinuance is understood to be confined to legal estates, and to be a consequence of the rules of tenure. At law, the fine of a *cestui que trust*, as such, will not

(*f*) *Weale* v. *Lower*, Pollexf. 55.

(*g*) *Clifford* v. *Asbley*, 1 Ch. Ca. 268; *Salisbury* v. *Bagot*, 1 Ch. Ca. 278; Mitford's Pleadings, 201; Supra 233.

have any operation. To lay a proper foundation for any legal operation of a fine by a *cestui que trust*, he ought to make a feoffment, that his fine may not be exposed, as it otherwise would be (*h*), to the objection that *partes finis nihil*, &c. Many fines, levied [263] with a view to gain a legal title by non-claim are open to this answer, and are not to be relied on. This observation has equal application to fines by persons entitled to the *equity of redemption* of lands mortgaged in fee, if they are to be used as a bar to strangers, having legal interests. It is well understood that a fine by a mortgagor, or mortgagee will not bind the other party (*i*).

That a stranger may be barred, the mortgagee, as having the freehold, should levy the fine, or he and the mortgagee should levy the fine. A fine by a person who has merely an equity of redemption, would be avoidable by the plea of *partes nihil*, &c.

When the mortgagee has a term of years, and the mortgagor retains the fee, then the fine should be by the mortgagor, and not by the mortgagee.

Let it be remembered, however, that a person who has an equity of redemption, may levy, and often does levy, a fine as an assurance by way of alienation as distin-

(*h*) Essay on Estates, p. 51. (*i*) 1 Vent. 82. *Welden* v. *Duke of York*, 1 Vern. 132.

guished from a fine to operate by way of non-claim.

Suppose a mortgage in fee, and then the mortgagor makes a feoffment and levies a fine to a stranger to the use of the mortgagee, without his concurrence, would the plea of *partes nihil* avail? On the one hand it may be said, the feoffment did not devest, and was fraudulent; on the other hand, that sometimes a mortgagor aware of a defect in his title, is anxious to levy a fine to operate by non-claim without disclosing the defect to the person who has a mortgage in fee of the property. Under these circumstances, he should levy a fine to the mortgagee, and declare that the uses shall operate to confirm the mortgage. By levying the fine to the mortgagee, though ignorant of the transaction, the fine will be kept free from the objection, that *partes finis nihil*, &c. &c.

It is allowed in equity, that a fine by one equitable owner, with non-claim, may be pleaded as a bar in equity to the right of another equitable owner (*j*): and that a fine, levied by a person claiming an equity of redemption in fee, may be a bar to another person who has a right to that equity (*k*).

It is observed by Mr. Cruise (*l*) that a fine

(*j*) 1 Ch. Ca. 49, 278.
(*k*) 2 Freeman 21.
(*l*) On Fines, 106.

levied *before entry or receipt of rent*, will be void on the same principle,—*viz.* want of freehold.

This observation must be understood with the qualification, that the freehold is in some other person. A fine by a person who has a seisin, in point of fact, as by actual possession; or in law, as an heir on the death of his ancestor, and before any abatement by a stranger (*m*); or by construction of law, as a person who is intitled to the reversion or remainder expectant on an estate in the possession of his tenant, or of a person connected with him in privity of estate [264] may levy a fine with effect. In all these instances the freehold is in the person levying the fine, and the plea of *partes finis nihil*, &c. will be irrelevant. In Lord *Townsend* v. *Ash* (*n*), the persons who insisted on the efficacy of the fine, were persons who had a *defeasible* title, under an estate gained by adverse possession. They had levied a fine, but having levied the fine before they had any seisin, in fact, or in law, the fine did not avail them.

And a fine levied under a possession obtained by fraud, though good at law, has in a court of equity been restrained from accomplishing its object (*o*).

(*m*) *Hemsley* v. *Price*, Cro. Eliz. 639.

(*n*) 3 Atk. 336.

(*o*) *Cartwright* v. *Pulteny*, 2 Atk. 380. *Baker* v. *Pritchard*, 2 Atk. 387.

Tenants in common, coparceners, and *joint-tenants*, have an ownership only in their aliquot parts, and the operation of a fine *by them*, will be confined to their respective shares. Though joint tenants are seised *per my et per tout*, a fine levied by a joint-tenant of the intirety, will be good only for a moiety. It will sever the joint-tenancy (*p*).

These observations apply to the tenants of this description only while the joint-tenancy, &c. continues. When one joint-tenant, tenant in common, or coparcener disseises his companion, and by that means
[265] acquires a sole seisin (*q*), the fine will operate to the extent of the share acquired by disseisin, as well as the original share. Whether there has been a disseisin, is, frequently, a question of fact, and is to be collected from circumstances.

Lord Mansfield's observations in *Doe* v. *Prosser* (*r*), on this point, are deserving of particular attention. So are those of Lord *Kenyon*, in *Peaceable* v. *Read* and others, 1 East, 568.

And it is concluded, that a fine, levied to operate by non-claim, may run as against one joint-tenant, tenant in common, or coparcener, who is free from disabilities,

(*p*) 1 Cruise, 104. 6 Mod. 45.

(*q*) *Fairclaim* v. *Shackleton*, 5 Burr. 2604.

Doe v. *Prosser*, Cowp. 217. 1 Inst. 243, b. 373, b. 374 a.

Ford v. *Lord* Grey, 6 Mod. 44.

(*r*) Cowp. 217.

although on account of disabilities it cannot run against another joint-tenant, tenant in common, or coparcener (*s*). The point is decided on the statute of limitations, of 21 Ja. 1 ; and as all the statutes of limitations are made *in pari materia*, the decision on one of those statutes seems equally applicable to the others of them.

2. *To whom a Fine may be levied.*

All persons who may be grantees in a deed may be conusees in a fine.

The *king* may be a conusee (*t*).

So may an *infant*, a *married* woman, &c. And when a married woman is merely a conusee, it is not necessary that she should be solely examined apart from her husband, for she cannot be prejudiced. But when there is a fine to a married woman, and the render is from her, she ought to be solely examined, since the render may be a prejudice to her (*u*).

When a wife is merely a *grantee* in a fine, the fine may be levied to her alone : but her husband during the coverture, and on [266] his death, the wife herself, may avoid the fine by disagreeing to it ; so may her heir

(*s*) *Row* v. *Rowlston*, 2 Taunt. 441. Supra, 237.
(*t*) Densh. 12. 7 Co. 32.
(*u*) 2 Inst. 515. 2 Roll. Abr. 17. (M) pl. 9.

after her death without having agreed to the fine. When the wife is to render the lands, it is apprehended her husband ought to be a grantor jointly with her in the render.

So a person *attainted* may be a conusee in a fine (*v*).

So may a *corporation* sole or aggregate (*w*).

3. *In what Courts a Fine may be levied.*

The fine must be levied in a court *having jurisdiction* over the lands.

A fine levied in the court of Common Pleas at Westminster, of lands in a county palatine, is *coram non judice*, and void (*x*).

So is such fine when levied of lands in *Wales*, &c.

On the other hand, a fine levied in the court of Common Pleas of lands in *ancient demesne*, is not void. But the lord will have a right to reverse the fine by a writ of disceit, to restore the lands to his jurisdiction (*y*). It is said that the lands are not within the jurisdiction of the superior courts (*z*). That position is at least questionable. If the lands are not within the jurisdiction, [267] how can the fine remain in force between

(*v*) West. Symb. 815.
(*w*) Densh. Read. 12.
(*x*) 4 Inst. 205, 223.
(*y*) Supra, 248.
(*z*) 1 Cruise, 97.

the parties? How can it change the tenure, even for a time, into frank-fee? And how can a second fine operate even as a bar by non-claim against the lord?

All that can be said is, that as between the lord and the tenant, it is an infringement on the franchise of the lord, to levy the fine in any other court than that of the lord.

So a fine levied of *copyhold lands*, in the court of Common Pleas, is not open to the objection of being *coram non judice*. That court has jurisdiction over the lands, though the copyholder ought to be impleaded in the lord's court. This is said, in application to those instances in which the court of Common Pleas has jurisdiction over the lands, as far as they are of freehold tenure; so that the lord may implead or be impleaded in that court.

The courts in England have no jurisdiction over lands in Ireland (*a*). So the courts in this country have no jurisdiction over lands in the West Indies. Sometimes, however, a fine of lands in the West Indies is levied in the courts of Westminster-hall. This is done merely because the courts in the plantations respect such fine, as a species of solemn conveyance.

(*a*) Densh. Read. 3.

Admitting the court to have jurisdiction over the lands, a fine may be levied in,

1. The court of Common Pleas.

[268] 2. The court of King's Bench ; at least when a suit is depending in that court on a *writ of error* from the court of Common Pleas (*b*). And a fine levied in the court of King's Bench, on a writ returnable in that court, is voidable only, and not void (*c*).

3. Courts of Great Sessions in Wales. See 34 and 35 Hen. VIII. c. 26. s. 40.

4. Counties Palatine, *viz.*

Lancaster ; see stat. 37 Hen. VIII. c. 19.

Chester ; see stat. 2 and 3 Ed. VI. c. 28. 43 Eliz. c. 15.

Durham ; stat. 5 Eliz. c. 27.

5. Court of ancient demesne.

6. Inferior courts, by usage, confirmed by act of parliament, as in some cities, boroughs, &c. (*d*).

4. *On what Writs a Fine may be levied.*

A fine may be levied on every writ by which lands may be *demanded, charged*, or *bound ;* or which in any sort *concern lands*, as a writ of

Mesne (*e*),

(*b*) 1 Cruise 73. Densh. Read. 3.
(*c*) Co. Read. 8. 9 Vin. Abr. *Fine*, 217.
(*d*) Co. Read. 8.
(*e*) Ib. 10.

Warrantia chartæ (*f*),
De consuetudinibus et servitiis (*g*),
Quod permittat (*h*), [269]
Quid juris clamat (*i*),
Right of advowson (*j*),
Quare impedit (*k*),
Assize (*l*),
Præcipe quod reddat (*m*),
Right, close or patent (*n*),
Dower (*o*),
Covenant (*p*),
Annuity (*q*).

In modern practice the *writ of covenant* is in general, and almost invariably, made the ground-work of the fine.

5. *Of what Parcels a Fine may be levied.*

A fine may be levied of all things of which a *præcipe quod reddat* will lie (*r*); viz. 1, Land in all its varieties. 2, Of other things, as

Advowson,
Right of presentation,

(*f*) 2 R. Abr. 14. (F.) pl. 14.
(*g*) Ibid. pl. 12.
(*h*) Co. Read. 10.
(*i*) 2 R. Abr. 15. (F.) pl. 22.
(*j*) 1 Cruise, 18.
(*k*) 2 R. Abr. 14. (F.) pl. 13.
(*l*) Ibid. pl. 16.
(*m*) Ibid. pl. 19.
(*n*) *Hunt* v. *Bourn*, 1 Salk. 340. 2 R. Abr. 14. (F.) pl. 11.
(*o*) 2 R. Abr. 14. (F.) pl. 20.
(*p*) Co. Read. 10. 2. R. Abr. 14. (F.) pl. 9. & 15 (G.) pl. 3.
(*q*) 2 R. Abr. 14. (F.) pl. 10.
(*r*) Shep. Touch. p. 9.

Rent-charge,
Chief rent,
Office,

[270] Things *in prendre*, if to be ascertained with sufficient certainty,

And of lands, whether they are held in possession, or in remainder or reversion,

Tithes,
New River shares,
Undivided part.

But a fine cannot, it is said, be levied of

Common in gross *sans nombre* (*s*).

Annuity (*t*).

But a judgment on a writ of annuity will, it is apprehended, bind the interest of the parties, and even of a married woman, in an annuity. And there are many instances of fines levied of annuities; and some of them on a writ of covenant (*u*).

Office of dignity.

6. *By what Names a Fine may be levied.*

In fines, as in adverse actions, the parcels ought to be demanded by their legal names.

The description, then, should be of a

(*s*) 1 Cruise, 121.
(*t*) Shep. Touch. pl. 11.
(*u*) 2 R. Abr. 15. (G.) pl. 1.

given number of messuages, acres, &c. (*v*) : and not by the name of a *farm*, *tenement*, &c. as in *deeds*.

But as to the quantities, &c. great lati- [271]
tude is given by the courts now, since fines are considered as common assurances. The deed leading or declaring the uses of the fine is considered as part of the assurance, and the intention of the parties, respecting the parcels, will be collected from the deed (*w*).

It seems almost to be a general rule that in fines and common recoveries, the lands, &c. will pass by any denomination the parties shall give them, so as the intention to comprise them be clear (*x*).

In Dyer 47, and 1 Burr. 144, 145, it is assumed that buildings on land may be recovered by a writ demanding the *lands*, (the defendant having built on the land,) since the plaintiff has demanded them by the quality of which they were under his title. The ground seems to be, that he has a right to treat the buildings as a nuisance, or encroachment. *Sed vide infra* 273.

A fine of *lands* will, it should seem, bar an intail of *rent :* but a fine of *rent* will not be

(*v*) *Massey* v. *Rice* et al Cowp. 346.

(*w*) *Faveley* v. *Easton*, Cro. Car. 269, 276.

Eyton v. *Eyton*, 1 Bro. P. C. 151.

(*x*) *Massey* v. *Rice*, Cowp. 346.

binding on the issue, claiming under an intail of the *lands* (*y*).

The certainty of the lands may be made out by *averment*, and of course proved by parol evidence, or from the deed of uses. As where a person who has two manors of the same name, levies a fine of a manor of that name, without any circumstance of distinction (*z*). But unless there were circumstances, as evidence, to show in certainty which manor was to pass, the fine would be void for uncertainty.

The deed (*a*) by which the uses of a fine are declared, is the measure by which juries are governed in ascertaining the description of property of which a fine is levied. And
[272] courts of justice constantly allow the fine to be amended, as to the parcels, from the deed of uses. In particular, they will not suffer a fine to pass more lands than were intended to be included; although the parties may have a greater quantity of lands than are enumerated in the parcels of the fine, and such lands are within the descriptive terms of the fine.

It is also said that a fine will not pass a greater number of acres than are contained

(*y*) *Heliot* v. *Saunders*, Cro. Jac. 700.

(*z*) Gilb. Evid. 38. 2 R. Ab. 676. pl. 11.

(*a*) 1 Bro. P. C. 151.

in the writ and concord, although the deed of uses mentions more (*b*).

There are cases, however, to the contrary.

In 6 Co. 67, it is stated to have been adjudged in *Sir John Bruyn's case*, in the beginning of the reign of *Elizabeth*, that in a common recovery, (which is had by agreement and consent of the parties,) of acres of land, they shall be accounted according to the customary and usual measure of the country, and not according to the statute *de terris mensurandis*.

In 12 Vin. Abr. *Evidence* (*c*), there is this passage.

"On a trial in the north, whether lands were comprised in a common recovery or not: being, as described, but 28 acres; yet the fact was they were 120 acres. Yet *bene:* because the intent of the party, is, what is to govern in these cases, and these 28 acres shall not go according to statute, but the estimation of the parties. *Per* King, Ch. Tr. Vac. 1727."

And in *Eyton* v. *Eyton* (*d*), it was argued on the part of the defendant, (and the argu-[273] ment seems to have prevailed,) that the deed of uses, and not the fine and recovery,

(*b*) Jenk. Cent. 254.
(*c*) P. 240.
(*d*) 1 Bro. P. Ca. 151.

was the measure by which the jury were governed.

At all events, the rule is to amend the recovery by the deed of uses, when the lands are described by name, in the deed of uses; or it was evidently the intention of the parties to comprehend them. An affidavit is now required, of the *intention* to include the parcels, which are omitted out of the fine, &c. (*e*) unless there be a manifest intention disclosed by the deed to include the parcels in question. Under such circumstances of intention, it should seem the affidavit will be dispensed with, when by reason of the death of the parties it cannot be made (*f*). At least an affidavit of the belief of an intention to comprise the parcels, will be sufficient.

In all cases of amendment, it is an essential circumstance that the lands shall be included either under a special denomination, or by general words in the deed of uses (*g*).

A recovery comprised 42 messuages, and two acres of land: forty-four messuages were built on the scite: and application was made to amend the recovery.

(*e*) *Wheeler* v. *Heseltine*, 2 Bos. and Pull. 560.
Dowse v. *Reeve*, ib. 578.
(*f*) *Milbanke* v. *Jolliffe*, 2 Bos. and Pull, 580: in *Notis*. *Loggin* v. *Pullen*, Barnes, 21.
(*g*) *Pearson* v. *Broughman*, 1 H. Black. 73.

The court, after hearing the affidavit read, and precedents of amendment, said, the whole land being conveyed, containing the forty-four messuages, gives a good title to the grantee, for the whole, and therefore the amendment is unnecessary.

But if the amendment were necessary, it could not be made in this case, there being nothing to amend by, it cannot be made by the deed, stated in the affidavit, to make a tenant to the precipe ; because that would not authorize the amendment : and there is no deed stated, to lead the uses of the recovery, from whence the amendment could be made. But clearly the title of the grantee is good, without any amendment.

This decision supports the former authorities, (*h*) that buildings on land will pass by the name of the land : and it goes still further ; as the decision is on a general principle, and not on the restricted point, that the right of the demandant was to the land, before the buildings were erected.

7. *The Parts of a Fine.*

The parts of a fine are,
1st. The original writ. [274]
2d. Licentia Concordandi.
3d. The concord. To which are added,

(*h*) Supra, 271.

4th. The note of the fine.

5th. The foot of the fine.

The three first are the material and essential parts.

First. The original writ is essential to the validity of a fine. Unless there be an original writ, there is not any basis or ground work, for the fine (*i*). A fine without an original writ will be voidable (*j*), and not void (*k*), for error. And, no parcels can be introduced into the fine, besides those in the writ. Unless there be a writ there cannot be either a plaintiff or defendant, in other words, a conusor or conusee.

These circumstances must concur in the writ. There must be.

1st. A plaintiff or demandant.

2d. A tenant or deforceant.

3d. The parcels, with the proper return, &c. *teste*, &c. so as to appoint a time for the appearance of the parties in court, and to give authenticity to the writ. The writ must have remained in force till its re-
[275] turn: and it must be returnable on a law-day, and not on a *dies non juridicus*, as *Sunday*, &c.

A *retraxit* (*l*) puts an end to the legal

(*i*) West Symb. s. 23. Co. Read. 1, 10.

(*j*) 18 Ed. 1 stat. 4. 2 Inst. 513.

(*k*) *Count Lestrange's case*, 2 R. Ab. 14. pl. 6. Plow. Com. 394. b.

(*l*) Bro. Abr. *Judgm.* pl. 114. *Fine*, pl. 82.

virtue of the writ. And at the common law, the force of the writ would have been determined by the death of the *king* (*m*), before the return. Now by the statute of 1 *Anne*, c. 8, s. 5, no original writ, &c. shall abate by the demise of the king or queen.

Still, however, the death of either of the parties *before the return of the writ* (*n*), will determine the authority conferred by the writ. Of course, a fine levied on the foundation of a writ, when the only plaintiff, or only deforceant dies before the return of the writ, will render the proceedings erroneous, and liable to be avoided for error. But if there are several plaintiffs or several deforceants, and one of the plaintiffs or deforceants dies before the return of the writ, the fine will be erroneous as against that person only who shall die. The fine is generally acknowledged before the writ of covenant is sued out; and this writ may, as to the courts of Westminster-Hall, be sued out in vacation, returnable of a preceding term, so that the fine though acknowledged in the vacation, may be good, notwithstanding the [276] death of one of the parties before the term, provided the writ of covenant be made returnable, as of the preceding term.

(*m*) Bro. Abr. *Fine*, 85.
(*n*) *Clements* v. *Langharne*, 2 Lord Raym. 872. *Wright* v. *Mayor of Wickham*, Cro. Eliz. 468.

In *Wales*, and the counties palatine, it was a great inconvenience, that all fines were heretofore acknowledged in the vacation, and levied as of the next great sessions, &c. when the writ of covenant was made returnable; so that no purchase could be safely completed during the vacation: but these courts seem now to have conformed their practice to that of the superior courts.

This is done in *Lancashire*, upon a suggestion that some of the conusors are ill, and doubts are entertained of their living till the next assizes. The *fiat* of the vice-chancellor must be obtained for the purpose. The additional expense is from £3 to £4.

Secondly. Of the Licentia Concordandi.

The licentia concordandi is the licence given by the crown for the accommodation of the suit. On the original writ a fine called the *premier-fine*, and on the licence to accommodate, a fine called the *post-fine*, or in modern times the *king's silver*, is due.

Both these fines are now assessed at the same time, at the Alienation office. The time of payment, and mode of entering, are regulated by the statute of 32 *Geo. II.* c. 14: and by this statute, s. 2, it is enacted that "no fine, until the same be marked with "the sum to which the post-fine amounts "in the King's Silver Office shall be effec-

" tual in law." And the officer of the King's Silver Office or his deputy is now restrained from receiving any writ of covenant, unless it appear by the mark and indorsement of such receiver, that the post-[277] fine has been paid.

The licence to accord, or king's silver, is entered to this effect.

" Robert Drury, Esquire, gives to our " lord the king, seven pounds for licence " to *accord* with Thomas Tey, Esquire, " and Elizabeth his wife, of a plea of cove- " nant of the manors of, &c."

Such entry ought to contain the following particulars.

1st. The sum given for licence to compound.

2d. The party who pays it. This should be the person in whom the fee is to be vested.

3d. The plea, and between whom as parties.

4th. The lands for which the fine is paid (*o*).

Any error in the entry of the king's silver as to the parcels, is amendable (*p*).

Thirdly. The concord, which is the formal part of the contract between the parties. and of the essence of the fine.

The concord is the substance of the fine.

(*o*) *Tey's case*, 5 Co. 39, a. (*p*) *Bohun's* case, 5 Co. 43. 1 Cruise, 132.

It contains the acknowledgment; and is to be made *in person*, either in court, or before commissioners under the authority of a writ of *dedimus potestatem*, or before the chief justice of the court of Common Pleas, (who, by virtue of his office, and without any writ of *dedimus*, may take the acknowledgment of a fine,) or before justices of assize. In case of an acknowledgment taken by justices of assize, it is the practice to sue out a writ of *dedimus potestatem* to them after the acknowledgment is taken; but this course, though usual in practice, is not deemed absolutely necessary.

The concord in a fine *sur conuzance de droit come ceo*, is to this effect.

And the agreement is such to wit, that the aforesaid A. hath acknowledged the aforesaid messuage, with the appurtenances, to be the right of the said C, as that which the said C. hath of the gift of the aforesaid A. *And* the same messuage, with the appurtenances, the said A. hath remised and quit-claimed, from him the said A. and his heirs, to the aforesaid C. and his heirs, for ever. *And moreover* the said A. hath granted, for himself, and his heirs, that he will warrant to the aforesaid C. and his heirs, the aforesaid messuage, with the appurtenances, against him the said A. and his heirs, for ever. And for this, &c.

Taken and acknowledged the
day of
in the year of the
reign of King George the
Third, before

ANOTHER FORM.

And the agreement is such, that is to say, that the said A. and C. have acknowledged the tenements aforesaid, with the appurtenances, to be the right of the said D., as those which the said D. hath of the gift of the said A. and C. *And* those they have remised and quit-claimed, from them, the said A. and C, and their heirs, to the aforesaid D, and his heirs, for ever. *And moreover*, the said A. and C. have granted, for themselves, and the heirs of the said A, that they will warrant to the aforesaid D, and his heirs, the aforesaid tenements, with the appurtenances, against them, the said A. and C, and the heirs of the said A. for ever. *And further*, the said A. and C. have granted for themselves, and the heirs of the said C, that they will warrant to the aforesaid D, and his heirs, the aforesaid tenements, with the appurtenances, against them, the said A. and C, and the heirs of the said C, for ever. And for this, &c.

Taken, &c.

ANOTHER FORM.

And the agreement is such, that is to say, that the said A. and C. D. and F, and G. have acknowledged the aforesaid tenements, and common of pasture, with the appurte-
[280]nances, to be the right of the said J. and L, as those which the said J. and L. have of the gift of the said A. and C, D. and F, and G. *And* those they have remised and quit-claimed, from the said A. and C, D. and F, and G, and their heirs, to the said J. and L, and the heirs of the said J, for ever. *And moreover,* the said A. and C. have granted, for themselves, and the heirs of the said C, that they will warrant to the said J. and L, and the heirs of the said J, the aforesaid tenements, and common of pasture, with the appurtenances, against them, the said A. and C, and the heirs of the said C, for ever. *And further,* the said D. and F. have granted, for themselves, and the heirs of the said F, that they will warrant to the said J. and L, and the heirs of the said J, the aforesaid tenements, and common of pasture, with the appurtenances, against them the said D. and F, and the heirs of the said F, for ever. *And also* the said G. hath granted, for himself, and his heirs, that he will warrant to the aforesaid J. and L, and the heirs of the said J, the

aforesaid tenements, and common of pasture, with the appurtenances, against him the said G, and his heirs, for ever. And for this, &c.

Taken, &c.

The following is the form of concord in a fine *sur conuzance de droit tantum.* [281]

And the agreement is such, to wit, that the aforesaid E. hath acknowledged the aforesaid tenements, with the appurtenances, to be the right of the said C. *And* he hath granted, for himself and his heirs, that the aforesaid tenements, with the appurtenances, which W. R. and A. his wife hold for the term of the life of the said A, of the inheritance of the said E, on the day on which this agreement is made, and which, after the decease of the said A, ought to revert to the said E. and his heirs; shall after the decease of the said A, entirely remain to the said C. and his heirs, for ever. *And* the aforesaid E. hath granted for himself, and his heirs, that he will warrant to the said C. and his heirs, the aforesaid tenements, with the appurtenances, in such manner as is aforesaid, against him the said E, and his heirs, for ever. And for this, &c.

Or instead of the grant there may be a release from one and his heirs, to the other and his heirs.

A fine *sur concessit* for years may be in this form.

And the agreement is such, to wit, that the aforesaid C. H. and E. have granted to the aforesaid A, the aforesaid tenements, with the appurtenances. *To have and to hold* the aforesaid tenements with the appurtenances to the said A, from the feast of the Annunciation of the blessed Virgin Mary, last past, until the full end and term of twenty-one years, from thence next
[282] ensuing, and fully to be complete and ended. *Yielding and paying*, therefore, yearly, to the aforesaid C. and E, and the heirs of the said C, one pepper-corn, at the feast aforesaid, during the term aforesaid, if it be demanded, and two fat capons at the feast of Easter yearly, during the term aforesaid. *And* the aforesaid C. and E. have granted for themselves, and the heirs of the said C, that they will warrant to the aforesaid A. the tenements aforesaid, with the appurtenances, against them the said C. and E, and the heirs of the said C, during the term aforesaid. And for this, &c.

Taken, &c.

The form of a fine *sur concessit* for life, by a tenant in remainder.

And the agreement is such, to wit, that the aforesaid A. and B. have granted the tene-

ments aforesaid, with the appurtenances, to the said C. and D. and the heirs of the said C. *To have and to hold* the said tenements, with the appurtenances, to the said C. and D. and the heirs of the said C, for and during the life of the said B, without impeachment of waste, and for and during all and whatsoever else the said A. and B. have in the tenements aforesaid, with the appurtenances, but subject, and without prejudice to the estates, which were limited by, and are now subsisting under the last will and testament of the Right Honorable Robert late Earl of E, the father of the said B, and bearing date on or about, &c. to commence and take effect prior to the estate by the same will limited to the said B, for her life, in the tenements aforesaid, with the appurtenances. *And* the said A. and B. have granted for themselves, and the heirs of the said B, that they will warrant the said tenements, with the appurtenances, to the said C. and D. and the heirs of the said C. during the term of the natural life of the said B, to commence and take effect in possession when the estates limited by the said will of the said Robert Earl of E, prior to the estate thereby limited for the life of the said B. shall be determined. *And* for this, &c.

This fine passed. There is no form of the sort among the precedents.

Form of a fine *sur concessit* for lives, to preserve a reversion in tenant for life, having power of leasing.

And the agreement is such, to wit, that the said John and Susanna have granted to the said A. B. the tenements aforesaid, with the appurtenances. *To have and hold* the aforesaid tenements, with the appurtenances, unto the said A, and his heirs, until the death of the survivor of and or which shall first happen until the death of the survivor of the said John and Susanna.

And the said John and Susanna have granted for themselves that they will warrant to the said A, and his heirs, the tenements aforesaid, with the appurtenances, during the term aforesaid, against them the said John and Susanna, and the survivor of them.

A fine *sur grant et render* is generally in this or the like form; varying according to circumstances.

And the agreement is such, to wit, that the aforesaid M. hath acknowledged the aforesaid tenements, with the appurtenances, to be the right of the said J, as those which

the said J. hath of the gift of the aforesaid M. *And* those he hath remised and quit-claimed, from himself, the said M, and his heirs, to the aforesaid J. and his heirs, for ever. *And moreover* the said M. hath granted for himself and his heirs, that he will warrant the aforesaid tenements, with the appurtenances to the said J. and his heirs, against himself the said M. and his heirs, for ever. *And* for this acknowledgment, [283] remise, quit-claim, and warranty, fine and agreement the said J. hath *granted and rendered* (*q*) to the said M. the aforesaid tenements, with the appurtenances, in the same court, *To have and to hold* the said tenements, with the appurtenances, to the said M. and the heirs which the said M. shall beget on the body of L., his now wife. *And* if it shall happen that the said M. shall die without heirs begotten by him on the body of the said L., *then* the aforesaid tenements, with the appurtenances, entirely to remain to the said L, during her life, and after the decease of the said L, the aforesaid tenements, with the appurtenances, entirely to remain to the said J. and his heirs, for ever.

The parties to every concord are
1st. The conusor, and
2d. The conusee.

(*q*) This form differs from the precedents.

The concord must name or refer to the parties and the parcels, and contain words of grant, limitation, &c. and the warranty to be entered into between the parties.

Of the Parties.

[284] The fine must be between the same persons as are named parties in the original writ (*r*). A stranger to the writ cannot be the grantee of an immediate estate (*s*). To this general rule there are these exceptions,

Viz. a reversioner received on default (*t*) by a tenant for life, or a person who comes in as vouchee (*u*) in a real action, may be the conusor; for the *reversioner* or *vouchee* becomes party to the suit, and stands in the place of the person against whom the writ was sued. But a *vouchee* cannot, with effect, levy a fine to a *stranger*.

Such fines, however, are voidable only, and not void (*v*).

And in a fine *sur grant et render*, the render may be to a stranger, by way of remainder after a particular estate (*w*). The render, however, of the first or immediate estate must be to a person who is a party to the writ (*x*). If a render of the immediate es-

(*r*) Co. Read. 6.
(*s*) 3 Co. 5.
(*t*) Co. Read. 11.
(*u*) 3 Co. 29, b.
(*v*) Litt. § 669. Co. Litt. 333.
(*w*) Co. Read. 6.
(*x*) 3 Co. 5.

tate be to a person not party to the fine, the fine is voidable only, not void (*y*). So if the render be to two, of whom only one is named in the writ, the fine is voidable, as to him, for error (*z*).

Of the Parcels.

No parcels besides those comprised in the writ, can be included with effect in the con-[285] cord of the fine. These alone are the lands of which the courts have jurisdiction by virtue of the writ. A fine levied of any other lands (*a*) is levied without a proper authority to warrant it, and to this extent, the fine will be erroneous. But in a fine *sur grant* of *lands*, there may be a render of *rent* issuing out of the *same* lands (*b*). For as a suit is depending of these lands ; a rent issuing out of these lands, may be rendered by the conusee to the conusor of the lands.

So when the grant is of the *intirety*, the render may be of a *third* part ; but if the grant is of a third part, the render cannot be of any larger or other share (*c*).

So in all fines the concord may distribute the parcels, by granting a divided part to

(*y*) *Owen* v. *Morgan*, 3 Co. 5.

(*z*) *Owen* v. *Morgan*, 3 Co. 5.

(*a*) Co. Read. 11. 2 R. Abr. 14.

(*b*) Co. Read. 11. 2 R. Abr. 16. 2 Inst. 514.

(*c*) 2 R. Abr. 16, pl. 11. 1 Cruise 66, 67.

one and the residue to another; or an undivided share to one, and an undivided share to another.

So when the grant is in fee, the render may be for a particular estate. But the render cannot be in fee, when the grant is expressly, or by construction of law, for a particular estate.

Lord Coke (*d*) propounds the rule in these
[286] terms; A. may grant and render to B. a rent of the same manor contained in the fine, but not out of any other land; neither can the grant and render be of any thing *collateral* to the land, &c. contained in the writ, or of another nature, and neither issuing out of, nor incident to the land, &c. contained in the original.

When the parcels lie in different counties, the practice used to be, to have several writs of covenant; one for the parcels in each county; and only one concord and one fine (*e*). The practice now, in pursuance of a regulation which has lately taken place, is to have a distinct concord and distinct fine for the lands in each county. In consequence of an order of Lord Chancellor Hatton (*f*), several owners of distinct tenements will not be allowed to join in the same fine;

(*d*) 2 Inst. 514.
(*e*) 2 Inst. 512. Dyer, 227. 1 Cruise, 31.
(*f*) Wils. 47. 1 Cruise, 32.

unless the lands are under the value of 200*l.* and there is an affidavit to that effect.

This rule has an exception of coparceners, joint-tenants, and tenants in common; and the rule is merely for the regulation of the conduct of the officers, and if not enforced, the fine will be effectual.

Of Words of Limitation. [287]

In a fine *sur conuzance de droit come ceo*, &c. the fee will pass without any words of inheritance (*g*). Words of limitation, however, if added, will confine the effect of the fine, to the particular estate which is expressed, as for life, in tail, &c. (*h*).

So no words of limitation are necessary in a fine *sur conuzance de droit tantum* (*i*); but being added, they will have the effect of the intention they express.

In fines *sur grant et render* and fines *sur concesserunt*, words of limitation are generally added: and they are necessary, when more than an estate for life is to pass: for a grant, by fine, of the *tenements*, will not, without express words, pass more than an estate for life.

Except as to lands of the tenure of *gavel-*

(*g*) Co. Litt. 9, b.
(*h*) *Hunt* v. *Bourne*, 1 Salk. 340. Dyer, 69. Shep. Prac. Couns. 155. Co. Read. 2.
(*i*) Co. Read. 6.

kind (*j*) the judges will not allow lands to be limited to two and their heirs (*k*). They require the fine to be to two and the heirs of one of them (*l*).

Certainty is the alleged ground of insisting on this practice, since it is the object of
[288] fines to settle the possession, not only for the present, but for the future, in the most certain and secure manner. But what reason is there for allowing a fine of lands of gavelkind tenure to be levied to two and their heirs, which does not equally apply to ether lands? May not two persons be equally interested as the grantees or coparceners (*m*) of other lands, as well as those of gavelkind tenure? Though other lands descend to one son, while gavelkind lands descend to all the sons as one heir, yet other lands may, in some cases, descend to several females, and even to several males being the descendants of females, as coheirs.

Besides, the grant *to two* is totally unconnected with any reason which concerns a grant *by two;* and there is an apparent absurdity in supposing that the right cannot be acknowledged as in two, when the law recognizes and sanctions a grant to two, as joint tenants in fee. This practice then

(*j*) Rob. Gavelk. 132.
(*k*) 2 Roll. Abr. *Fine* 18 (O.) pl. 8; 19 (P.) pl. 4, 5, 8. 5 Co. 38 b. 2 Mod. 49.
(*l*) Ibid. and 2 Co. 74 b.
(*m*) 2 Roll. Abr. *Fine* 18 (P.) pl. 1.

is one of those anomalies which destroys the beauty of the juridical system, by introducing a case totally void of foundation in principle.

Accordingly, a fine though levied to *two and their heirs* will be allowed to be of force (*n*). The rule is *fieri non debuit sed* [289] *factum valet* (*o*).

So it is said a single fine ought not to be levied on *condition* (*p*); and yet if the fine pass, it will be effectual (*q*): and in a render it is allowed, that a condition shall be inserted. And it is also said, that a fine ought not to be with an *exception*, a clause of saving, of re-entry, &c. But in practice an exception is allowed, and it would be absurd if it were not: and in fines *sur grant et render*, a clause of re-entry may be introduced in the rendering part of the fine.

A fine may be good with or without a warranty.

In general a warranty is added; and it should be adapted to the circumstances of the case, and the intention of the parties.

As between a purchaser and seller, or even a settler for the benefit of other persons, the warranty ought not to extend beyond the agreement of the parties.

A warranty in a fine by husband and wife,

(*n*) 2 Mod. 49.
(*o*) 5 Co. 38, b.
(*p*) 5 Co. 38, b.
(*q*) Ibid.

will enable the conusee to maintain an action of covenant against the wife (*r*).

When the fine is to two and the *heirs of*
[290] *one*, the warranty ought to be conformable to the grant.

It is said that a warranty from two and *their* heirs ought not to be allowed (*s*). To this there is an exception, when the lands are of gavelkind tenure.

In practice, the general rule, that there cannot be a warranty from two and their heirs, is avoided by taking distinct warranties from each and his heirs ; or one warranty from both, for themselves and the heirs of one of them, and another from both, for themselves and the heirs of the other of them. Thus that is accomplished by indirect means, which is not allowed in direct terms.

Fourthly. The note of the fine is only an abstract of the writ of covenant, and of the concord. It names the parties, the parcels, and the agreement.

Fifthly. The foot of the fine includes the whole matter. This is in truth the chirograph, and the document of which the indentures are a transcript, or at least from which they are made.

It begins with these words, *This is the*

(*r*) *Wotton* v. *Hale*, 2 Saund. 177.

(*s*) 2 Roll. Abr. *Fine* 19. pl. 9.

final agreement, and it rehearses the names of the parties, the parcels, and the day, year, and court in which, and before whom, the fine is levied.

When a chirographer makes out the [291] indentures, the fine is said to be engrossed, and the chirograph is conclusive evidence of the fine (*t*).

The fine, however, is perfect before it is engrossed,—and evidence may be given of it without producing the indentures.

Of the proclamations, when there are any, evidence must be given by producing and proving an examined copy of them. The usual indorsement on the indentures will not be received as evidence, in a court of justice, of the proclamations (*u*).

The chirographer is the officer intrusted by law to transcribe the indentures from the records ; and full credit is, for that reason, to be given to the authenticity of these indentures.

No such authority resides with him in regard to the proclamations.

8. *When a Fine is complete.*

First, As a conveyance.

Till the writ is *returnable* the court has

(*t*) Gilb. Evid. 24. Buller's N. P. 229.

(*u*) Gilb. Evid. 25. Buller's N. P. 229.

no jurisdiction; for this reason, till the writ is returnable, a fine is not complete. The death of the parties, either of all the plaintiffs, or all the deforceants, before the writ of entry is returnable, will avoid the fine (*v*). But the death of one of several conusors, or of one of several conusees, before the writ is returnable, will avoid the
[292] fine only as against the deceased party. It is sometimes said that the fine is not complete till payment of the king's silver. On this point it is to be observed, that the king's silver is not payable till the writ of covenant is returnable. It cannot be considered as paid at an earlier period. And when the party dies, after the writ of covenant is returnable, but before the king's silver is paid, a *caveat* against the fine may be entered, and the fine will be stopped; but if the king's silver be paid, even after the death of the party, on a writ of covenant made returnable in his life-time, the fine will be complete, and there are not any means of impeaching it (*w*).

The acknowledgment of the concord is the principal act of the parties (*x*). This concord and the payment of the king's sil-

(*v*) *Wright* v. *Mayor of Wickham*, Cro. Eliz. 468*.
Clements v. *Langharne*, 2 Lord Raym. 872.

(*w*) 2 Inst. 511. *Farmer's* case, Hob. 330.
Harnies v. *Micklethwaite*, Barnes, 214.

(*x*) 2 Inst. 511.

ver are the only substantial parts proceeding from the parties.

It is true there must be an original writ. That writ must be sued out, and be returnable, before the entry of the king's silver can be made on the same.

But this writ may, as to fines levied in the court of Common Pleas, be made returnable as of a preceding, or as of a subsequent term.

If it be returnable of a preceding term, [293] the fine will be good, and may be recorded, notwithstanding the death of one of the parties *during the vacation*, and even before actual payment of the king's silver, so as the king's silver be paid: and, as already noticed, the king's silver may be paid after the death of the party, unless prevented by a caveat entered for that purpose at the king's silver office (*y*).

But if the writ of covenant be made returnable as of the next term, or of any particular return in a term, then the death of one of the parties in the mean time, will, as to him, vitiate the fine. As far as he is concerned, there is not any longer a conusor or conusee (*z*).

The practice is to take the acknowledgment in the vacation, and to have the writ

(*y*) *Barber* v. *Nun*, Barnes, 218.

(*z*) 1 Cruise, 48.

of covenant returnable, sometimes as of the preceding, and sometimes as of the succeeding term. This practice is exempt from error; for the time when the fine is acknowledged is immaterial.

The writ of covenant, as of a succeeding term, may be returnable as of the first day of the term, or any other return day; and
[294] the fine, when levied, will have relation, in point of legal operation, to that day, without any regard to the time at which the fine was acknowledged, or the king's silver paid.

In *Lloyd* v. *Say & Sele* (*a*), a fine acknowledged in March, and recorded as a fine of Michaelmas term, was allowed to be free from the objection that it did not make a good tenant to a writ of entry in a recovery suffered of Michaelmas term.

This doctrine of relation has been carried so far, that a conusee of a fine levied of a preceding term, will avoid a statute entered into in the vacation, and before the fine was acknowledged (*b*).

And in *Peere Williams's Reports*, 3 vol. 170, in a note, a fine levied on a writ of covenant returnable as of a subsequent term, is considered as a revocation of a will

(*a*) *Lloyd* v. *Say and Sele*, 1 Brown, P. Ca. 379.

(*b*) Jenk. Cent. 250.

published after the fine had been acknowledged, and the deed of uses executed.

A doubt is now entertained whether this point be law. The case of *Selwyn* v. *Selwyn* (*c*) appears to afford a principle, on which that doubt may be supported.—Why should not the fine and deed of uses operate as parts of the same assurance, and have relation to the deed of uses, as the principal part of [295] that assurance?

On account of the cases, concerning the relation of fines, to the return day of the writ of covenant, it will be prudent, when a fine is levied to gain a title by non-claim, and a feoffment is to be made to acquire the freehold, as a foundation for the fine, that the fine should be so levied, that the relation may be subsequent to the date of the livery on the feoffment.

A purchaser, relying on a fine, as the efficient part of a conveyance, by a married woman, or by a tenant in tail, should, before he pays his purchase-money, take care that the fine is acknowledged, that the writ of covenant on which it is levied is returnable, and that the king's silver has been paid.

(*c*) 2 Burr. 1131.

Secondly, When a fine is complete as operating under the statute of proclamations.

By the several statutes of proclamations, two objects are to be obtained.

1, To bar heirs in tail (*d*).

2, To gain a title by non-claim (*e*).

1. To bar heirs in tail, there must be
[296] proclamations. Hence fines levied in courts of ancient demesne, or in other courts, not having the power by statute law of proclaiming their fines, will not bar the issue claiming under an estate-tail (*f*). These proclamations may be made in the life-time, or after the death, of the conusor or conusee ; and even after a claim has been made by the issue in tail (*g*) : and as soon as the proclamations are made, the operation of the fine as a *conveyance*, conferring a good title against the heirs of the intail, has relation to the return of the writ of covenant.

In a former part of this chapter (*h*), it has been considered by whom a fine may be levied, so as to bar the issue in tail. This subject will be resumed and more fully treated on in a subsequent part (*i*).

It is not sufficient, that the person by whom the fine is levied is merely a *parent*, &c. (*j*).

(*d*) Stat. of 4 H. VII. 32 H. VIII.

(*e*) 4 H. VII.

(*f*) *Hunt* v. *Bourne*, Salk. 339.

(*g*) *Parslow's* case, 3 Co. 90, b.

(*h*) Supra, 218.

(*i*) Infra, 306.

(*j*) Shep. T. 20. Hob. 333. *Edwards* v. *Rogers*, W. Jones 456.

He must be an ancestor connected in privity of estate, or of title.

2. To bar strangers by non-claim, the proclamations are an essential part of the assurance. The period of non-claim begins to run from the time when the last proclamation is made. Of course it is from that time that the period of limitation prescribed by the statute of non-claim must be computed; unless perhaps when the fine is executory: for when the fine is executory it has been doubted, whether the period of [297] non-claim will begin to run till the fine shall be executed (*k*). According to Lord Coke, the period of non-claim on a fine at the common law, ran on an executory fine, from the time at which the fine was levied (*l*).

The proclamations may be void for error in them: as not made at the period prescribed by the statutes by which they are regulated; or as made, according to the entry, on a *dies non juridicus*, as on a Sunday, or out of the term, which is contrary to the statutes. Notwithstanding an error in the proclamation, the fine may be good by the rules of the common law, as a common law conveyance, or as an estoppel (*m*). The

(*k*) Per Lord Redesdale, 1 Sch. & Lef. 228

(*l*) Co. Read. 14. But see 2 Inst. 517.

(*m*) Dyer, 216, a. 1 Bulst. 206.

issue in tail, however, are not bound by estoppels. When the fine itself is avoided for error, the fine will lose its effect, under the statute of non-claim, and also the statutes for barring entails, as well as at the common law.

These observations must, as to heirs in tail, be understood to be confined to error in the form of the fine; in short, to the want of an efficient fine. For though a fine may be avoided as to strangers, and as far as relates to its common law operation, by the plea of *partes fines nihil*, &c. or defeated
[298] by the entry of a person who has some right independent of the intail, (as by a tenant for life who *was dissiesed*); or if the heir in tail makes his claim after the fine is levied, and before the proclamations are made; yet in all these instances the proclamations, when made, will be a bar to the issue (*n*).

In regard to persons to be barred by nonclaim, it will be competent to them to plead, in answer to a fine, that *partes fines nihil habuerunt*. By that plea, supported by evidence, the fine, and, as a consequence, the effect of the proclamations will be avoided.

(*n*) *Hunt* v. *King*, Cro. Eliz. 589, 610. *Parslow's* case, 3 Co. 90, b.

9. *The difference between a fine, as a conveyance, an estoppel, a bar to issue in tail,* and *a bar under the statute of non-claim,* is now to be considered.

First, as a conveyance.

A fine, as a *conveyance,* must proceed from the seisin of the party. It is in general use as a conveyance by a married woman. On account of her coverture, she is not competent to convey without some act of record, on which she may be privately examined.

When a fine is levied by a tenant in fee, it, like every other ordinary conveyance, merely passes the estate vested in the party. When levied by a tenant in tail, it passes a *base* or determinable fee (*o*), except when he [299] has an estate-tail in possession. In the excepted case, instead of operating as a conveyance, it discontinues the estate-tail, and passes the fee-simple under a new title (*p*).

If the tenant in tail has previously conveyed a base fee, his fine, as a *distinct* assurance, operates rather as a confirmation or release, in extinguishment of the intail, than as a conveyance. No discontinuance will under these circumstances be effected (*q*). That the tenant in tail is no longer seised

(*o*) *Seymour's* case, 10 Co. 95.

(*p*) *Doe* v. *Whitehead*, 2 Burr. 704.

Driver v. *Hussey*, 1 H. Blackst. 269.

(*q*) *Seymour's* case, 10 Co. 95.

by force of the intail, is the ground of this distinction. No other tenant in tail, except a tenant of an estate-tail in possession, can create a discontinuance. For this reason, a tenant of an estate-tail, after a subsisting estate for life, cannot discontinue the estate-tail, even although the tenant for life join in the fine (*r*).

But when a lease and release are made by a tenant in tail, and a fine is afterwards levied, in pursuance of a covenant contained in the indenture of release, and as part of the same assurance, the fine will be a discontinuance (*s*).

[300] A fine by tenant for his own life, if the limitation in the fine be confined to the period of *his life*, will operate merely, and simply, as a conveyance, and not as devesting the remainders or reversion.

So a fine by a tenant for life in remainder, after another estate for life, importing the grant of a larger estate, may cause a forfeiture, but cannot devest any estate, when the owner of the prior estate continues in possession (*t*).

But if tenant for his own life in possession levy a fine, which imports to convey

(*r*) *Driver* v. *Hussey*, 1 H. Blackst. 269. *Bredon's* case, 1 Co. 76.

(*s*) *Doe* v. *Whitehead*, 2 Burr. 704.

(*t*) *Carhampton* v. *Carhampton*. 1 Irish Term Rep. 567.

an estate in fee, in tail, or for another life, it will operate to devest the estate of those in remainder (*u*). Of course it passes a tortious estate, and turns the estate of those in remainder or reversion into a right of entry. On this point Mr. *Sergeant Williams*, in one of his very useful notes, observes (*v*), "It seems to be an established rule, that "an actual entry is necessary to avoid a "fine," (with proclamations it must be understood) "levied by tenant for life. "However, in the case of *Doe*, lessee of "*Compere* v. *Hicks*, it was said by counsel "in argument, that doubts had been enter- "tained, whether a fine, levied by tenant "for life, had any operation. But however "such doubts may have arisen, there seems [301] "no foundation for them."

Let it be remembered that the fine of a tenant *for years*, a copyholder, or owner of any chattel interest, has not any operation on the freehold. Unless the freehold be acquired by means of a feoffment, no estate will be devested. Any attempt to set up the fine as a bar, may be answered by the plea of *partes finis nihil habuerunt* (*w*).

(*u*) *Focus* v. *Salisbury*, Hard. 400. Co. Litt. 251, a, b. *Fermor's* case, 3 Co. 77. *Smith* v. *Parkhurst*, 18 Vin. 413.

(*v*) 1 Saund. 319.

(*w*) *Focus* v. *Salisbury*, Hard. 400.

Secondly, Estoppel.

As often as a fine is levied by a person who has no *estate* or seisin, it may operate as an estoppel: in other words, as a conclusion, on any right he might otherwise have had, or on any claim he might otherwise have asserted.

Thus a fine levied by a person who afterwards becomes *heir*, will be an estoppel to his claim as heir; and yet a release by him by deed, while he had merely a hope or chance of succession, would not have barred his title (*x*).

So a fine levied by a person who has a *contingent interest* will, in some cases, bar; in others, bind that interest (*y*).

And if a person who has merely a right of entry, as a disseisee, or a right of action as a discontinuee, levies a fine to a *stranger*, the person in possession may take advantage of this fine, to preclude the party from claiming the land in opposition to his own fine (*z*).

On the authority of *Vick* v. *Edwards* (*a*), there was, at one period, a prevailing practice, to require a fine from two persons, when an estate was limited to them and the *survivor* of them and his heirs, in the hopes

(*x*) *Sir Marmad. Wivell's* case, Heb. 45. 1 Roll. Abr. 482. (S.) pl. 2. *Morse* v. *Faulkner*, 1 Anstr. 11. 3. T. Rep. 365.

(*y*) *Weale* v. *Lower*, Pollexf. 54.

(*z*) *Buckler's* case, 2 Co. 55.

(*a*) 3 P. W. 372.

of *acquiring the fee* by means of the estoppel. On that practice the following observations may be deemed relevant. They have more than once been allowed their weight in practice, by gentlemen in whose opinion confidence is deservedly placed.

" The more this title is considered, the " more reason there is to be satisfied that " it is neither marketable, nor can be ac- " cepted with safety, either by a mortgagee, " or a purchaser, if the conclusion drawn " in a former opinion, that the fine levied " by J. N. and A. his wife, extinguished " their contingent remainder in fee, be well " founded. Now that the remainder was " extinguished seems to flow from the na- " ture and operation of fines, and the prin- " ciple of tenures, and to be a direct conse- " quence of the sixth resolution in *Buck-* [303] " *ler's* case, 2 Co. 55, a. and from *Weale* " and *Lower*, Pollexfen, 54, and *Moor's* " *case*, Palmer, 365. It was resolved in " the first of these cases, that if the dis- " seisee levy a fine to a stranger, the dis- " seisor shall hold the land for ever; for " the disseisee against his own fine cannot " claim the land, and the conusee can- " not enter. The right which the conusor " had cannot be transferred to him, but " the right by the fine is extinct, whereof " the disseisor may take advantage. And " in the second of these cases, that if the

" fine had been levied by *Thomas* in fee,
" this would have barred the estate of the
" heir, destroyed the contingent use, and
" operated to the benefit of the possession,
" as the fine of a disseisee to a stranger. In
" the third case, baron and feme were te-
" nants in special tail, with remainder to A.
" in tail ; the baron discontinued and died ;
" then the wife levied a fine ; and it was
" resolved that there was a discontinuance,
" and that the fine had strengthened the
" discontinuance, so that the feme could not
" enter, nor be remitted. Upon the same
" principle, a feoffment by a person who
" has a mere right or title of entry, though
" made to a stranger, will extinguish that
" title. Sir *Mayle Finch's* case, 6 Co. 70.
" The only authorities in opposition to
[304] " this doctrine, are, first, the dictum in
" March, p. 105, and that opinion is found-
" ed on other cases, which, properly under-
" stood, do not authorise the opinion ; and,
" secondly, the opinion of Lord *Talbot*, in
" *Vick* v. *Edwards*, 3 Peere Wms. 372.
" This latter opinion proceeded on reason-
" ing which it is impossible to support ;
" for in the first place, though it be true
" that the contingent interest of the heir of
" the surviving trustee would be bound
" by the fine of his ancestor, it does not fol-
" low that the title of the trustees would not,
" as to the fee, have been extinguished by

" the operation of their fine: and if extin-
" guished, the joining of the testator's heir
" was necessary, not only for supplying the
" want of proving the will, but to pass the
" fee vested in him as the heir. And when
" the Chancellor relied on *Weale* and *Lower*,
" as a case where a fine was adjudged to
" pass an estate, not vested, by way of
" estoppel, and to convey the interest of
" such estate, which accrued by the con-
" tingency happening afterwards, he did
" apply that case with his usual judgment
" and nice discrimination.

" The case of *Weale* and *Lower*, so far
" from supporting this proposition, as ap-
" plicable to the facts in *Vick* and *Edwards*,
" and the purpose for which it was adduced,
" is founded on a distinction between a
" fine *sur concessurent* for years, which,
" from its partial operation, binds the in-
" terest, when it shall vest, instead of extin- [305]
" guishing the title, and a fine *sur conu-*
" *zance de droit*, &c. or other fine which
" extends to the whole fee, and which, as it
" cannot pass the right to the fee, is held to
" operate by way of extinguishment. In
" short it should seem, the fine, as being a
" public document, of which a stranger
" may take advantage, enables the person
" in possession, (in other words the person
" who has the seisin or estate,) to resist a

" claim by the conusee of the fine, on the " ground that the conusor had not any " estate which he could transfer: and to " resist the claim of the conusor or his " heirs, by showing that the conusor has " precluded himself and his heirs, of all " title which might otherwise have been " claimed by them."

Sometimes a fine operative by way of estoppel, is levied to another and his heirs, and embraces *the fee;* at other times it is confined to a *term for years.* When the fine extends to the fee, the right is wholly extinguished; at least there is a complete estoppel against it (*b*). But when a fine is for years, it is an estoppel only *during the term.* It binds the estate, when it vests, without concluding the title to the fee (*c*).

[306] From these deductions, it follows, that there are many cases in which a fine, *sur concesserunt for years,* may be recommended, when it would be extremely injurious to conclude the title by a fine of the inheritance. This is particularly the case when there is a contingent interest of *inheritance*, or a *joint-tenancy* of the inheritance: and it is an object that the contingent inheritance shall not be destroyed; or that the joint-tenancy shall not be severed.

(*b*) *Buckler's* case, 2 Co. 55. (*c*) *Weale* v. *Lower,* Pollexf. 66.

Thirdly, As a bar to the heirs in tail.

The bar of the heirs in tail depends on the statutes of 4 H. VII. and 32 H. VIII. That the heirs in tail may be barred, it is necessary only, that a fine should be levied by an ancestor, and duly proclaimed. The fine may be effectual, whether the person by whom it is levied, has a vested estate in possession, reversion or remainder (*d*); a contingent interest (*e*); or only a title of entry, or of action (*f*); and the fine of a person within the line of the intail will bar his own issue, even though the fine should be levied before the intail descend on him (*g*), or should be levied after alienation (*h*). It will, under these circumstances, even bar [307] all collaterals, claiming under the same intail, so as the right of the intail devolve to the person, or some one of his descendants, by whom the fine is levied; or, in other words, so as he or some one of his issue become heir *de facto* to the intail (*i*); and the issue in *lineal descent* may be barred by the fine of their parent, being within the extent of the gift in tail, although the parent never becomes the heir (*j*).

(*d*) Co. Litt. 372. Case of Fines, 3 Co. 84. Jenk. Cent. 274. Shep. Touch. 25.

(*e*) *Grant's* case, 10 Co. 50, a.

(*f*) *Zouch* v. *Bamfield*, 3 Co. 88, 90, a. Jenk. Cent. 275.

(*g*) Hob. 285. Jenk. Cent. 275.

(*h*) 3 Co. 90. a.

(*i*) Hob. 258, 332. Jenk. Cent. 274.

(*j*) *Archer's* case, 3 Co. 90. a. *Blackwilliam's* case. Hob. 333, Moor 252, contra.

On this construction of the statutes, a fine levied by *one ancestor* alone (*k*), when the gift in tail is to both parents, will be a bar to the issue, so as to extinguish the intail. At the same time, that the heirs are barred under these circumstances, the fine will not affect the interest of the other ancestor, further than to take from the estate-tail its descendible qualities. The other ancestor will have a base or determinable fee, instead of an estate-tail. The other collateral qualities, as the right of suffering a common recovery, will remain; and the estate of the other ancestor may descend to the issue as his general heir, though not as heir to the intail. The sole effect of the fine is to preclude the issue from claiming as issue in tail. But a fine by a *father* when the gift is to the *mother*, and her heirs of
[308] her body begotten by the father, will not bar the intail. He is merely a *parent*, not an ancestor. The lands are not intailed on him. He is named merely to describe those particular heirs of the body of his wife, who are within the scope of the intail.

So a gift to a man and his heirs of his body, will enable the son, after the death of the father, to bar the intail, so far as to exclude his brothers and sisters, and their

(*k*) *Beaumont's* case, 9 Co. 138. *Baker* v. *Willis*, Cro. Car. 476.

issue, as well as his own issue (*l*); but unless the intail had descended on him or his issue, his brothers or other collaterals would not be barred by his fine if levied in the lifetime of the donee (*m*). So when a gift is made to a man and the *heirs males* of his body, with remainder to him and the heirs *females* of his body; a fine levied by him will bar both estates tail. He is the ancestor to both intails. But when a gift is made to a man, and the *heirs males* of his body, with remainder to him and the heirs *females* of his body, and he dies, leaving a *son and a daughter;* a fine levied by the son, though it will bind his own issue, will not bind his sister or her issue; for each of the children has a distinct estate-tail, and the daughter, and her heirs, are to take the estate in tail female, independently of the son or of his issue (*n*). So if limitations are made in favor of the first and other sons, successively, in tail, a fine levied by the elder son or his issue, [309] will not by force of the statutes of proclamations bar the younger sons or their issue. Each son has a distinct intail; and the younger sons and their issue do not claim under the same intail which gave an estate-tail to the person by whom the fine is levied,

(*l*) Co. Litt. 372, a.
(*m*) *Bradstock* v. *Scovell*, Cro. Car. 434. Hob. 258, 333.
(*n*) Shep. T. 20.

though they claim under the same will or settlement. Also, though on a different ground, a fine by a younger brother or his issue, will not bar the elder brother or his issue claiming under the same intail; nor will the fine of the elder brother or his issue bar the younger brother or his issue, unless the elder brother or his issue becomes heir to the intail, either before or after the fine is levied (*o*). So a fine levied by a sister or an uncle, who is *pro tempore*, the heir in tail, will not bar a more immediate heir, who afterwards comes into existence (*p*).

From these points, it will be collected, that a fine may be levied with effect so as to bar the intail, when a recovery could not be suffered to bar it effectually.

Fourthly, As a Bar by Non-claim.

That a fine may operate as a bar by non-claim it must be duly proclaimed. It is essential also that one of the parties should have an estate of freehold, that the plea of *partes finis nihil habuerunt*, may not be rele-
[310] vant; with the exeception, that an equitable freehold in one of the parties, will, it should seem, be sufficient to support the fine against

(*o*) Hob. 258, 333. (*p*) Hob. 333. Shep. Touch. 25.

persons claiming under equitable remainders, &c. Such estate of freehold may be either in possession, remainder, or reversion.

In *Salvin* v. *Clerk* (*q*) the conusor in the fine had an estate in reversion, expectant on his own lease for life made by discontinuance, and the fine operated by nonclaim to bar the reversion in fee under the rightful seisin. There are other cases of the like description, in which also the like decision was pronounced. In all these cases the estates to be barred were devested before the fine was levied; as when a disseisor made a lease for life and afterwards levied a fine (*r*); or a discontinuor, by means of a particular estate, had gained a new reversion by wrong. *Anne Twist's case* (*s*) involves the same considerations.

That a fine may operate by nonclaim, there must also be an *adverse possession*, understood with the qualifications which have been noticed in a former part of this chapter (*t*).

10. *On what Fines Uses may be declared.*

On every fine which transfers an *estate*, even on a fine *sur grant et render*, uses may

(*q*) Cro. Car. 156.
(*r*) Co. Litt. 298. a.
(*s*) Shep. Touch. 27.
(*t*) Supra, 224.

be declared (*u*). By the render a common law seisin is transferred, and a declaration of uses will be valid. It seldom happens, that a fine *sur grant et render* is levied to uses. When uses are to be declared, all that can be accomplished by the render in the fine, or by the render united with the declaration of uses, may be accomplished by the declaration of the uses alone. On this point it is observable, that the question has been raised, whether uses may be declared on the estate rendered by a fine, and that question has been decided in favor of the declaration of uses. A case in *Clayton's* Reports, which may seem to the contrary, is reconciled by considering the interval which elapsed as affording the conclusion that the grantee in the render took to his own use.

[311] That a common law seisin passes, and that there is a declaration of uses, are the two essential circumstances to call the statute of uses into operation. When no estate passes by the fine: when its operation, instead of passing an estate is to release a title, or extinguish a right; then no uses are admissible. In short, there is not any estate to supply a seisin to these uses.

(*u*) Moor. 45. Poph. 105.

11. *By whom Uses may be declared.*

Whoever *conveys* an estate by fine may declare the uses, to the extent of his ownership under the estate he conveys (*v*). Thus tenant for life may declare the uses, during his estate for life ; tenant in tail may declare the uses of the fine so long as the estate which passes from him, shall continue ; and tenant in fee-simple may declare the uses of that estate ; and the tenant of a remote estate in remainder or reversion, may declare the uses of such remote interest ; and each of several joint-tenants, tenants in common, and coparceners (*w*), may declare the uses of the fine as to his particular share. When several persons join in a fine, and in the declaration of the uses, the uses will [312] proceed from each person, and depend on his estate, according to the nature and relative degree of his ownership. Thus if tenant for life, with remainder to another in tail, with remainder to another in fee, join in a fine, and in a declaration of the uses, the uses will proceed from the tenant for life during his interest : from the tenant in tail during the continuance of the ownership under the intail ; and from the owner of the fee, after the ownership under these

(*v*) *Beckwith's* case, 2 Co. 57. Dougl. Rep. 25. 3 P. W. 210.

(*w*) 2 Co. 58, a. Palm. 405.

particular estates is determined, and in the mean time subject thereto. By this distribution the persons claiming under the uses, will have a title in the same manner as if it was derived under a joint conveyance, made by the tenant for life, the remainder man in tail, and the remainder man or reversioner in fee; and under such joint conveyance there is not any merger, notwithstanding there is an union of estates (*x*).

The next rule is that one person cannot declare the uses of a fine, levied by another.

Thus if two joint-tenants concur in levying a fine, neither of them singly can declare the uses of more than his share (*y*).

The same point is equally applicable to coparceners, and tenants in common.

So when tenant for life and the remainder-
[313] man in fee, join in a fine, a declaration of the uses by one of them, will not supply the want of a declaration of uses by the other (*z*).

And where tenant for life, a tenant in tail, and a tenant in fee, joined in a fine, a declaration of uses by the tenant for life, and tenant in tail, had no operation on the uses of the ultimate remainder in fee. The use of that estate resulted to its former owner, for want of a declaration by him (*a*).

(*x*) *Bredon's* case, 1 Co, 76. *Treport's* case, 6 Co. 14.
(*y*) 2 Co. 58, a.
(*z*) Dougl. 25.
(*a*) *Roe* v. *Popham*, Dougl. 24.

And on principle, a fine levied by a person who has an *estate*, and one who has merely a *right* or title, will operate as an extinguishment of the right, and leave the uses completely in the power of the owner. And under a fine by the owner and a *stranger*, the uses will result to the owner alone, or he alone may declare them (*b*).

To the general rule, there is an exception, or rather the semblance of an exception, arising from the peculiar connexion between *husband* and *wife*, when a fine is levied by them, of lands which they hold in right of the wife. The rules respecting the uses of their fine are,

1st. The wife alone cannot declare the uses of her fine (*c*).

2d. The husband alone cannot declare the [314] uses, against the consent of his wife, appearing by deed, or by any act in *pais*.

3d. The husband alone may declare the uses, unless his wife disagrees to these uses during the coverture (*d*).

4th. They may jointly declare the uses.

5th. When there are several declarations by them, and they are different, these uses, as far as they are different, will be void (*e*).

But as far as they agree in declaring the

(*b*) *Becket's* case, 2 R. A. 789.
(*c*) *Beckwith's* case, 2 Co. 57.
(*d*) Ibid.
(*e*) Ibid.

uses of the fine, either as to *part of* the lands, or as to part of the *estate* of the lands, so far the uses will be good. They will be rejected only so far as there is a variance in their several declarations. If they disagree in declaring the use of the *first* estate of any part of the lands; all the ulterior uses declared of that part, notwithstanding they concur in the declaration of these ulterior uses, will be void. This is all that was decided in *Beckwith's* case; though the conclusion drawn from that case, has been, that the first use will be void, although the husband and wife agree in declaring that use, provided they differ in the ulterior uses. It will be difficult, however, to support that inference from *Beckwith's* case; and still more difficult to reconcile it with
[315] principle. It is true Lord *Coke* calls the attention of the reader to the distinction between an agreement in the uses declared by the husband and wife of *part of the land and of part of the estate:* but taking this distinction with its context, it must be understood as referable to the particular case of a variation in the first use, from the legal impossibility of there being such a reversion as the wife intended to reserve, or such a remainder as she intended to limit, if her husband's declaration of the use were to be established. The language of the

resolution more clearly leads to this conclusion, or rather interpretation of the context. All that is said in reporting the resolution is to this effect :

" Although the variance was in the first " particular use, (the wife limiting it to " herself only for her life, and the husband " limiting it to him and his wife for their " lives,) and all the other uses in remainder " limited in both the indentures, are ac- " cording to both their consents, yet all " the uses are void. But if there be two " joint-tenants, or two having several es- " tates, and they join in a fine, and one " declare the use in one manner, and the " other in another manner, the same is " good for each of their parts ; for the " declaration of the use shall be directed " and governed according to their estates " and interests. But between husband and " wife, the estate is only in the wife, and so [316] " is the difference. But if the husband and " wife agree in the limitation of the use of " *part* of the land, and vary in the limita- " tion for the *residue* of the land, it is good " for part, and void for the residue. So " note, reader, a difference between va- " riance, touching the limitation of the use " of *part of the estate* of the land, and touch- " ing the limitation of the use of *part of the* " *land* itself."

Now in this resolution, there is not a single syllable which denies the validity of the declaration of the uses, when the husband and wife agree in limiting an estate for life to A, though they do not agree in the limitation of the ulterior uses. The language of Lord *Bacon* is, if they *sever*, then it is good for so much of the inheritance, as they concurred in (*f*).

When the wife agrees with the husband in the limitation of the ulterior uses, but differs from him in limiting the first use, it is possible, and even probable, that all the ulterior uses, unless they contravene the rule against perpetuities, may be supported as springing uses.

12. *Of resulting Uses.*

It is also to be observed that as far as no uses shall be declared, or the use of the fee shall be limited in contingency (*g*), the use will result to the former owner, according to the estate he had at the time of levying the fine. Or if several persons who have
[317] distinct estates, as tenant for life and remainder-man in fee, or as joint-tenants who hold to them and the heirs of one, join in a fine, without declaring any uses, the uses

(*f*) Bac. on Uses, 67. (*g*) 2 Roll. Abr. 789. 2 Co. 58.

will result according to the former ownership. (*h*) The exceptions are, that no use will result on a fine *sur grant et render* or on the grant of a particular estate (*i*) ; and that the conusee in a fine may aver an use in himself, or more correctly speaking exclude the resulting use, notwithstanding there is not any express declaration (*j*) ; and also that a tenant in tail, instead of having his old estate-tail under a resulting use, will have a fee-simple, in case the fine operates as a discontinuance ; and a base or determinable fee, in case the fine operates merely and simply as a conveyance.

The books are involved in some obscurity on this point. They say, the fine shall enure to the old or former uses (*k*).

These book are to be understood with the qualification that the uses result according to the former ownership, and not so as to revive the intail. This point has been expressly decided as to recoveries, and is equally relied on as to uses resulting from a fine (*l*).

Suppose a tenant in tail and the owner

(*h*) 2 Co. 58. Mo. 46.

(*i*) Mo. 106. 2 Co. 76.

(*j*) *Altham* v. *Anglesey*, Gilb. Eq. Ca. 17. 11 Mod. 210. *Roe* v. *Popham*, Dougl. 24. *Thrustout* v. *Peake*, Str. 12.

(*k*) *Waker* v. *Snow*, Palm. 352. *Argol* v. *Cheney*, Latch 82. Dougl. 25.

(*l*) *Hodges* v. *Fowler*, in the Exch. 1777. *Moxon* v. *Moxon*, ib. Com. Dig. Uses, D. 2. *Nightingale* v. *Ferrers*, 3 P. W. 207.

of the reversion in fee to join in a fine, and the use to result to them according to their former ownership; it is an interesting and curious point, involving a large portion of learning to be drawn from first principles, whether the tenant in tail or his heir can afterwards by suffering a common recovery bar the reversion. He might have done this before the fine. Strong are the arguments against his right, after the fine, to exercise this incidental power annexed to his estate-tail.

In point of law his estate-tail is extinguished by union with the fee. It is under rules of courts of equity, and the statute of uses working on these rules, that he has a *like interest*, corresponding as near as may be to an estate-tail, and not the same *identical* estate,—that the use results for a *base fee*. It seems that in equity, before the statute of uses, there would not have been an equitable estate-tail: and if there would not have been an equitable estate-tail, there would not have been a right to bar the remainder or reversion.

In answer, however, to this argument it may be urged, that even at law, and so in equity, an estate-tail, though converted into a base fee, confers the right on the donee in tail or his heir to enlarge the base fee into a fee-simple, to the prejudice, and in

exclusion of the reversioner or remainderman (*m*). But this reasoning does not seem sufficiently cogent to establish the right in the former tenant in tail to bar the remainder man by a common recovery. The point, however, is one of difficulty and of considerable nicety, and may be decided either way without much sacrifice of principle.

When the use of the fee results, that fee will be descendible from the first purchaser of the estate. For this reason, a fee which descended *ex parte materna*, will, under the resulting use, be descendible in like manner (*n*).

So if an estate-tail be taken by descent *ex parte paterna*, the fee taken by resulting use will be descendible, as if the donee in tail had taken the fee, as the purchasing ancestor (*o*).

And whether the use results, or is expressly declared, the same course of descent will prevail.

But a fee taken under the *render* of a fine is a new estate, and the conusee in the render will be deemed the purchasing ancestor. The fine *sur grant et render* is a double conveyance. It partakes of the nature, and

(*m*) Supra, 139.

(*n*) *Abbot* v. *Burton*, Salk. 590. *Fenwick* v. *Mitford*, 1 Leo. 182. Co. Litt. 22. b.

(*o*) *Roe d. Crow* v. *Baldwere*, 5 T. Rep. 104. *Martin* v. *Strachan*, 5 T. Rep. 107, in a note.

has the effect of a feoffment and re-enfeoffment (*p*).

Of Deeds to lead, and Deeds to declare the Uses of Fines.

When a fine is levied *after*, and in pursuance of, a covenant or agreement to levy a fine and declare the uses thereof, the deed containing such declaration or agreement
[319] is correctly denominated a deed to lead the uses of the fine; while a deed declaring the uses of a fine, takes its denomination from the circumstance that the deed is subsequent in date to the fine, and executed after the fine has been levied.

The subject of deeds to lead, and of deeds to declare the uses of fines, is of considerable interest to the profession. These deeds frequently occur in practice, and produce a material change in the title. To state the cases, and the rules of law on which they are grounded, and give the proper forms of deeds, will require more space than can be allotted for them in this volume. This learning will be the subject of the first chapter of the next volume.

(*p*) *Price* v. *Langford*, Salk. 337.

APPENDIX.

FORM I.

Form of Recovery Deed of Lands in different Counties, for the joint lives of the Tenant and Vouchee (*a*).

THIS INDENTURE, of three parts, made the day of in the 53 Geo. III. and in the year of our Lord 1813; BETWEEN E. M. of, &c. [*the intended vouchee,*] of the first part; A. B. of, &c. [*the intended tenant*] of the second part; and C. D. of, &c. [*the intended demandant,*] of the third part. WHEREAS by indentures of lease and release, bearing date respectively on or about the 9th and 10th days of May, in the year 1749, and made, or expressed to be made between H. M. of, &c. tinman, and Hannah his wife, of the one part; and W. K. of, &c. gent. of the other part, The messuage and hereditaments hereinafter in part described to be situate in the parish of T. in the said county of W. were conveyed and assured, after divers estates for life, and in tail, which are all now determined, to the use of the said E. M, therein described as the daughter of the said H. M. by the said H. his wife, and the heirs of her

PARTIES.

RECITAL of the creation of estate-tail in some of the parcels.

(*a*) See the Text, p. 104.

body lawfully issuing. And whereas by other indentures of lease and release, also bearing
The like in other parcels.
date respectively, on or about the 9th and 10th days of May, 1749, and made or expressed to be made between the said H. M. and H. his wife, of the one part, and K. M. of the other part; All those, the messuage and hereditaments hereinafter in part described to be situate in the parish of H, in the county of W, were conveyed and assured, after and subject to several particular estates for life and in tail, all of which are now determined, to the use of the said E. M. and the
Desire to suffer recoveries,
heirs of her body, lawfully issuing. And whereas the said E. M. is desirous of suffering two or more common recoveries, for the purpose of barring the several estates tail, limited to her as aforesaid, and enlarging the same estates tail,
and to include other lands.
into estates in fee simple. And whereas the said E. M. is seised of divers other messuages, lands, tenements, and hereditaments, hereinafter described: and although it is understood that the said E. M. is seised of the same messuages and hereditaments for an estate in fee-simple, it is deemed advisable that the same hereditaments should be comprised in the recoveries hereinafter agreed to be suffered, for the purpose of barring all estates tail, if there be any, of the said E. M.
Witnesseth that for barring intails,
in the same messuages and hereditaments. Now this indenture witnesseth that for docking, barring, and destroying all intails of and in the messuages and other hereditaments hereinafter released, or otherwise assured, or intended so to
and remainders, &c.
be, and all reversions and remainders, expectant on the same intails, and all conditions, and col-

lateral limitations annexed thereto, or affecting the same; and also in consideration of 10s. of lawful money of the united kingdom of Great Britain and Ireland, current in Great Britain, to the said E. M. well and truly paid by the said A. B, immediately before the execution of these presents, (the receipt whereof is hereby acknowledged,) She the said E. M. hath granted, bargained, sold, released, and confirmed, and by these presents doth grant, bargain, sell, release, and confirm unto the said A. B. (in the actual possession of the said A. B. now being, in virtue of a bargain and sale thereof made to him by the said E. M, in consideration of 5s. paid to her by the said A. B, by indenture bearing date on the day next before the day of the date, and executed before the execution of these presents, for one whole year, to be computed from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession,) ALL THAT messuage or tenement, and all houses, outhouses, buildings, barns, stables, gardens, orchards, curtilages, and appurtenances whatsoever thereunto belonging; And also all those four several closes, pieces, or parcels of land, meadow, or pasture ground, now or formerly commonly called or known by the several names of,

and for nominal consideration,

Tenant in tail grants, &c.

(reference to lease for a year)

PARCELS.

or by any other name or names, whatsoever, containing in the whole by estimation about twelve acres, be the same more or less: situate, lying, and being in the parish of T, and county of W, and near the highway leading from cross,

towards in the same parish, heretofore in the tenure or occupation of J. H, late in the tenure or occupation of J. A, his assigns, or under-tenants, and now or late of . *And also* all that messuage, or tenement, formerly in the possession of W. L, but afterwards of R. C, together with all barns, stables, buildings, houses, outhouses, shops, gardens, orchards, yards, fold-yards, and backsides, to the said last mentioned messuage or tenement belonging. And all those two closes, leasows, meadow, or pasture ground, heretofore into five parts divided, containing in the whole by estimation eleven acres or thereabouts, be the same more or less. All which said messuage or tenement, buildings, lands, closes, pasture-ground, and premises last mentioned, are now or were formerly called or known by the name of the and were heretofore in the tenure or occupation of the said W. L, his under-tenant or assigns, but afterwards of the said R. C, his under-tenants or assigns, and are situate, lying, and being in
or in one of them, in the parish of H, in the county of W, between the lands formerly of T. L, Esq., the lands formerly of T. A, the lands formerly of R. M., and the lane or roadway leading from towards and another lane there lying and being at the upper end of the said closes and pastures, on or near all parts thereof. *And also* all other the lands, tenements, and hereditaments, whatsoever, formerly of I. P. and E, his wife or one of them, and now of the said E. M, in which she hath any estate, right, title, or interest, either in possession, rever-

Sweeping clause.

sion, or remainder, situate, lying, and being in aforesaid, in the said county of W, with their and every of their appurtenances. *And also* all that parcel of arable land, containing by estimation two acres and an half, formerly in the tenure or occupation of T. G, and afterwards in the tenure or occupation of J. S, lying and being in the parish of B, in the said county of W, in a field there called Kay field, between the land of M. L. on the one part, and the land of G. K. on the other part, being in breadth, and extending in length from the land formerly of T. F. and afterwards of J. W. at the one end, unto the land formerly of T. E, Esq. heretofore in the tenure or occupation of A. C. widow, and afterwards of S. B. at the other end. One other close or pasture called Kayfield Close, containing by estimation four acres, formerly in the tenure of J. M, and afterwards of J. S, and being in the parish of B, and county of W, between the land formerly of R. L. and afterwards of W. S, and some other land heretofore in the tenure of A. C. and afterwards of W. S, on, or nearly on all parts. All which said last mentioned lands and premises were lately in the occupation of the said J. S, and are the premises which were conveyed and assured to the said H. M. his heirs and assigns for ever, by certain indentures of lease and release, bearing date respectively on or about the twenty-eighth and twenty-ninth of December, one thousand seven hundred and forty-four. *And also* all those two closes of ground and other lands, situate at and called And also all that piece or parcel of land containing about

Other parcels.

Reference to the deed of purchase.

Other parcels.

two acres and an half, now in the tenure or occupation of R. H; which said last mentioned lands were on a division or inclosure of the common and waste lands within the said manor and parish of B. allotted to the owner or proprietor of the said lands next hereinbefore described, for and in respect of the same, and are now better known and described, as all those several closes of land situate at in the parish of B, in the county of W, and now or late in the tenure or occupation of J. T. *And* also all, &c. *And* all houses, outhouses, edifices, buildings, barns, stables, yards, gardens, orchards, closes of land, meadow, and pasture, feedings, woods, underwoods, and the ground and soil thereof, commons, and common of pasture, and of turbary, and other commonable rights, hedges, ditches, fences, mounds, ways, paths, waters, watercourses, liberties, privileges, easements, profits, commodities, advantages, and emoluments whatsoever to the said messuages and other hereditaments hereby released, or otherwise assured, or intended so to be, or any of them, respectively, belonging, or in any wise appertaining, or accepted, reputed, deemed, taken, known, held, occupied or enjoyed, as, part, parcel, or member of the same, or any of them respectively. *And* all other the messuages, lands, tenements, and hereditaments, situate, lying, and being in the several towns, parishes, and places of T. H. B. B. in the counties of Warwick and Worcester, and each or either of them, in which the said E. M. hath any estate or interest in tail at law, or in equity, and every part and parcel of the same, with their and every

General words for farms.

General sweeping clause.

of their rights, members, and appurtenances. *And* the reversion and reversions, remainder and remainders, yearly, and other rents and profits of the said several messuages and hereditaments hereby released, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances (*a*). To HAVE AND TO HOLD the said messuages, hereditaments, and all and singular other the premises hereby released, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances, unto *and to the use of* the said A. B. and his assigns, during the *joint natural lives* of the said A. B. and E. M. To THE INTENT that the said A. B. may be tenant of the freehold, of all and singular the said messuages and hereditaments, hereby released, or otherwise assured or intended so to be, and every part and parcel of the same, with their rights, members, and appurtenances; *to the end* that two or more good and perfect common recoveries, with double voucher, may be had and suffered of the same messuages and hereditaments. *And* for that purpose it is hereby directed, declared, and agreed by and between all the said parties to these presents, as far as they respectively are interested, that the said A. B. shall permit and suffer the said C. D, or some other person or persons, at the costs and charges in all things of the said E. M, her heirs, executors, or administrators, at any time or times

And the reversion, &c.

Habendum to grantee for joint lives of grantor and grantee.

To make him tenant of the freehold,

that two common recoveries may be suffered:

(*a*) In this form the clause of "all the estate" to be omitted.

hereafter, to sue forth and prosecute, against him the said A. B. out of his Majesty's high court of Chancery, two or more writs of entry *sur disseisin en le post*, returnable before his Majesty's justices of the court of Common Pleas at Westminster; and by one of the said writs, demand of the said A. B. the said messuages, and hereditaments, hereby released or otherwise assured or intended so to be, with the rights, members and appurtenances, which are situate in the said county of Warwick, by the names and descriptions of two messuages, two gardens, 40 acres of land, 40 acres of meadow, and 40 acres of pasture, with the appurtenances in T; and by the other of the said writs, demand of the said A. B. the said messuages, and hereditaments, hereby released, or otherwise assured or intended so to be, which are situate in the said county of Worcester, with their rights, members, and appurtenances, by the names and descriptions of : or by such other apt, good, sufficient, and proper names, number of messuages, and acres, quantities, qualities, and other descriptions as shall be deemed necessary, proper, sufficient, and requisite to comprise the same. And that the said A. B. shall in his own person, or by his attorney or attornies lawfully authorised in that behalf, appear to each of the same writs respectively, and vouch to warranty the said E. M. And that the said E. M. shall in her own person, or by her attorney or attornies lawfully authorised in that behalf, appear gratis, and freely enter into the warranty of the said A. B; and, taking the same upon herself, vouch

One writ to be sued for the lands in the county of Warwick,

and another writ for the lands in the county of Worcester,

Mode of prosecuting the recoveries prescribed,

over to warranty the common vouchee of the court of Common Pleas, for the time being; who shall appear gratis, and freely enter in to the warranty of the said E. M, and after imparlance make default. So that judgment may be given upon each of the said writs respectively, for the said C. D, or other demandant or demandants, to recover all and singular the said messuages, and hereditaments, hereby released, or otherwise assured, or intended so to be, and every part and parcel of the same, with their rights, members, and appurtenances, by such names, quantities, qualities, and other descriptions as aforesaid, against the said A. B.; and for the said A. B. to recover in value against the said E. M; and for the said E. M. to recover in value against the common vouchee, as is usual in such cases. And that upon all and every recovery and recoveries to be suffered as aforesaid, execution may be sued and prosecuted by, and seisin had, taken, and delivered unto the said C. D, or other demandant or demandants, accordingly. And that every other act or thing requisite or proper to be done or executed, for the purpose of suffering and perfecting a common recovery or recoveries, of the messuages, and hereditaments, hereby released or otherwise assured, or intended so to be, with double, treble, or other voucher, to bar the estate or estates, interest or interests in tail, of the said E. M, of and in the same messuages, and hereditaments, and all reversions and remainders over and expectant upon the same estate or estates, interest or interests in tail, may be made, done, and executed. And by way of direction, and declaration, and

to bar the estates-tail, &c

Direction

that recoveries shall be suffered;

not of covenant, it is hereby granted, declared and agreed, by and between the parties to these presents, as far as they respectively are interested, and they hereby, for themselves, severally and respectively, and for their several and respective heirs, executors, and administrators, and according to their respective estates, rights, and interests, in the premises, consent and agree that the recoveries hereby agreed to be suffered shall be suffered and perfected with all possible dispatch;

and that parties will give effect to the same.

and that they respectively, and their respective heirs, on their respective parts, will use their utmost endeavours to give effect to the same recoveries, and also to these presents, and the grant, release, confirmation, or other assurance hereby made. AND IT IS HEREBY FURTHER DIRECTED, declared, and agreed by and between all the parties to these presents, as far as they respectively have any right, title, or interest in the premises, that immediately upon and after judgment obtained, and seisin had and taken, upon each such recovery as aforesaid, each recovery respectively so as aforesaid, or in any other manner, or at any other time or times, to be suffered; and also the bargain and sale for a year bearing date on the day next before the day of the date of these presents; and also these presents, and the assurances hereby made; *and* all and every other fine and fines, recovery and recoveries, and other assurances whatsoever, at any time or times heretofore, and to be at any time and from time to time hereafter, had, made, done, levied, suffered, executed, and perfected, of, or concerning all or any part of the said messuages, and hereditaments hereby released, or otherwise

Declaration that the recoveries when suffered,

the lease for a year, and the present deed, and all other fines, &c.

assured, or intended so to be, either by themselves, solely and alone, or jointly and together with any other lands, tenements, or hereditaments, by or between all and every, or any or either of the persons, who are parties to these presents, or to which they, or any or either of them, is or are, or shall or may be parties or privies, or a party or privy, shall, as to all the said parties to these presents, respectively, as far as they respectively can lawfully or rightfully direct the uses of the same, fine or fines, common recovery or recoveries, and other assurances, be and enure, and be adjudged, ex- shall enure; pounded, deemed, and taken to be and enure; and that the same was and were meant, and intended, and is and are hereby directed and declared to be and enure; and that the person or persons to whom And that persuch fine or fines, common recovery or recoveries, sons shall stand seised; and other assurances respectively, have or hath been or shall or may be levied, suffered, made, and executed, shall stand and be seised; *As to*, As to parcels for, and concerning the said messuages and heredi- conveyed, taments hereby released, or otherwise assured or intended so to be, and every part and parcel of the same, with their rights, members, and appurtenances. *To the use* of the said E. M. her heirs To the use of and assigns for ever; and to no other use, nor for grantor in fee any other end, intent, or purpose whatsoever. *In witness*, &c.

FORM II.

Form of a Conveyance to be made previous to suffering a Recovery, or executing a Recovery Deed, by a Person, when it is doubtful whether he is Tenant for Life, or in Tail; and when, if he be Tenant for Life, there is a contingent Remainder to one of his Sons. The Object being, to bar the Estate-tail, if any, and to protect the Estate for Life, if any, from the Consequences of Forfeiture, and in that case to preserve the contingent Remainders, if any, from Destruction (b).

THIS INDENTURE, made the day 40 Geo. III. and in the year of our Lord 1801; BETWEEN T. B. B. of, &c. gent, of the one part; and A. B. of [*some other person than the tenant*] of the other part. WHEREAS the said T. B. B. is either tenant for life, or in tail, of all, or some of the messuages, farms, lands, tenements, and hereditaments, hereinafter released or otherwise assured or intended so to be, and as to such parts thereof, if any, of which he is tenant for life, doubts are entertained whether there is a contingent remainder in favour of his eldest son for the time being, or some or one of his sons, under or by virtue of the will of bearing date on or about the day of and proved in the court of on or about the day of AND WHEREAS the said T. B. B. is desirous, and hath

PARTIES.

RECITAL that grantor is either tenant for life or in tail.

Desire to suffer a recovery.

b See the text, p. 112.

determined, to suffer a common recovery of the said messuages, farms, lands, tenements, and hereditaments; and it is deemed expedient that, prior to his execution of the necessary conveyance for making a tenant to the writ of entry, for suffering such recovery, he should convey the freehold of the said messuages, farms, lands, tenements, and hereditaments, so and in such manner that he may take back the immediate freehold for the joint lives of himself and A. B, with remainder to the said A. B. for the life of the said T. B. B, in trust for the said T. B. B. and his assigns during his life. NOW THIS INDENTURE WITNESSETH, that for the purposes hereinbefore expressed, and in consideration of 10s. of lawful money of the united kingdom of Great Britain and Ireland, current in Great Britain, to the said T. B. B. paid by the said A. B, immediately before the execution of these presents (the receipt whereof is hereby acknowledged,) The said T. B. B. hath granted, bargained, sold, aliened, released, and confirmed, and by these presents doth grant, bargain, sell, alien, release, and confirm unto the said A. B. his heirs and assigns, (in the actual possession of the said A. B. now being, in virtue of a bargain and sale thereof made to him by the said T. B. B., in consideration of 5s. paid to him by the said A. B. by indenture bearing date on the day next before the day of the date, and executed before the execution of these presents, for one whole year, to be computed from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession)

And that it is deemed expedient to convey, so that he may take the immediate freehold, with freehold remainder to a trustee.

WITNESSETH. That for purposes aforesaid, and nominal consideration.

The owner grants, &c.

(reference to lease for a year.)

PARCELS. ALL the messuages, farms, lands, tenements, and hereditaments of the said T. B. B. situate in the several parishes of in the county of and hereinafter particularly described, that is to say, *All*, &c.

General words for farms. *And* all houses, cottages, outhouses, edifices, buildings, barns, stables, yards, gardens, orchards, closes of land, meadow, and pasture, feedings, woods, underwoods, and the ground and soil thereof, commons, and common of pasture, and of turbary, and other commonable rights, hedges, ditches, fences, mounds, ways, paths, waters, water-courses, liberties, privileges, easements, profits, commodities, advantages, and emoluments whatsoever, to the said messuages, farms, lands, tenements, and hereditaments, hereby released or otherwise assured, or intended so to be, or any of them respectively, belonging, or in any wise appertaining, or accepted, reputed, deemed, taken, known, held, occupied, or enjoyed, as part, parcel, or member of the same, or any of them respectively.

And the reversion, &c. *And* the reversion and reversions, remainder and remainders, yearly, and other rents and profits of the said messuages, farms, lands, tenements, and hereditaments, hereby released, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances.

HABENDUM to grantee and his heirs for life of grantor. TO HAVE AND TO HOLD the said messuages, farms, lands, tenements, hereditaments, and all and singular other the premises hereby released or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances unto

the said A. B, and his heirs, for and during the natural life of the said T. B. B, *To the uses* and upon the trusts hereinafter declared, that is to say, *To the use* of the said T. B. B. and his assigns, during the joint natural lives of the said A. B. and T. B. B. *And* from and immediately after the determination of that estate, by forfeiture, surrender, or otherwise, then *To the use* of the said A. B. and his heirs, for the natural life of the said T. B. B, *In trust* for the said T. B. B. and his assigns. And to no other use, and upon no other trust whatsoever. *In witness*, &c.

To the use Of grantor for the joint lives of himself and grantee;

Remainder to the use of grantee, for life of grantor,

In trust for grantor.

FORM III.

In a Case in which the Defect appeared on the Recovery Deed, the Uses were limited as follows.

HABENDUM To A. B. in fee, *To uses.* First, to confirm an annuity.

HABENDUM to A. B. his heirs and assigns for ever. *To the uses* hereinafter declared thereof, that is to say, *In the first place* to revive, restore, confirm and give effect to the annuity of £20, to which the said E. M. is entitled, and all powers for recovering and enforcing the payment thereof.

And subject thereto, To the use of A. B. during the joint lives of himself and the grantor,

And subject thereto, *To the use* of the said A. B. during the joint natural lives of the said A. B. and M. R, and to the intent, and for the purposes hereinafter mentioned.

Remainder To the use of trustees for the life of the grantor, to protect against forfeiture.

And from and after the determination of that estate, *To the use* of the said E. F. and G. H, their heirs and assigns during the life of the said M. R., *Upon trust*, and to the intent, that the estate limited to the said E. F. and G. H. their heirs and assigns, may be a protection from forfeiture of the estate of the said M. R. for her life, so that the same messuages, &c. may during her life, be subject to the uses and trusts hereinafter limited, expressed, and declared of, and concerning the same.

Remainder

And from and after the decease of the said M. R., and in the mean time subject and without prejudice to the estate hereinbefore limited, the same messuages, &c. shall

remain, continue and be *To such uses*, &c. as are hereinafter limited, expressed and declared concerning the same. And it is hereby directed, &c. that the estate hereinbefore limited to the use of the said A. B. and his assigns, for the joint lives of the said A. B. and M. R, is limited to him and them, to the intent, &c.

To uses afterwards declared.

DECLARATION, that the estate is limited to A. B. to make him tenant to the *præcipe*, &c.

FORM IV.

Form of Recovery Deed to Uses, to prevent a Title of Dower: suffered by the conveying Party in the Form, No. II.

THIS INDENTURE, of three parts, made the day of 41 Geo. III. and in the year of our Lord 1801; BETWEEN T. B. B. of gent., and P. his wife [*the intended vouchees*] of the first part; R. P. of the Inner Temple, London, Esq. [*the intended demandant*] of the second part; and C. D. of [*the intended tenant*] of the third part, WITNESSETH, that for docking, barring, and extinguishing, all estates and interests in tail, reversions, and remainders, thereupon expectant and depending, of and in the messuages, farms, lands, tenements, and hereditaments hereinafter released, or otherwise assured, or intended so to be; And, for extinguishing the dower, right, and title of dower, of the said P. B. of and in the same messuages, farms, lands, tenements, and hereditaments; And for conveying, limiting, and assuring the same messuages, farms, lands, tenements, and hereditaments, to the uses, upon the trusts, and for the ends, intents, and purposes hereinafter limited, expressed, and declared, of and concerning the same; And in consideration of 10s. of lawful money of the united kingdom of Great Britain and Ireland, current in Great Britain, to the said T. B. B. and P. his wife, paid by the said

PARTIES.

WITNESSETH that for barring estates-tail, &c.

extinguishing dower,

and limiting the lands to uses,

and for a nominal consideration,

C. D, immediately before the execution of these presents, (the receipt whereof is hereby acknowledged,) The said T. B. B. and P. his wife, have and each of them hath, granted, bargained, sold, aliened, released, and confirmed, and by these presents do, and each of them doth grant, bargain, sell, alien, release, and confirm unto the said C. D. his heirs and assigns for ever, (in the actual possession of the said C. D. now being, in virtue of a bargain and sale thereof, made to him by the said T. B. B. and P. his wife, in consideration of 5s. paid to each of them by the said C. D, by indenture bearing date on the day next before the day of the date, and executed before the execution of these presents, for one whole year, to be computed from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession,) ALL the messuages, farms, lands, tenements, and hereditaments of the said T. B. B. situate in the several parishes of in the county of and hereinafter described, that is to say, *All*, &c. &c. *And* all houses, cottages, outhouses, edifices, buildings, barns, stables, yards, gardens, orchards, closes of land, meadow and pasture, feedings, woods, underwoods, and the ground and soil thereof, commons, and common of pasture, and of turbary, and other commonable rights, hedges, ditches, fences, mounds, ways, paths, waters, water-courses, liberties, privileges, easements, profits, commodities, advantages, and emoluments whatsoever, to the said messuages, farms, lands, tenements, and hereditaments, hereby released or

Tenant in tail and wife grant to C. D. in fee.

(Reference to lease for a year.)

PARCELS.

General words for farms.

otherwise assured, or intended so to be, or any of them respectively, belonging, or in anywise appertaining, or accepted, reputed, deemed, taken, known, held, occupied, or enjoyed as part, parcel, or member of the same, or any of them respectively. *And* the reversion and reversions, remainder and remainders, yearly and other rents and profits of the said messuages, farms, lands, tenements, and hereditaments, hereby released, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances. *And* all the estate, right, title, interest, use, trust, inheritance, term and terms for life or lives, property, possession, benefit, and equity of redemption, claim, and demand whatsoever at law and in equity, or otherwise howsoever, of the said T. B. B, and dower and right, and title of dower of the said P. his wife, of, into, and out of the said messuages, farms, lands, tenements and hereditaments, and every part and parcel of the same, with their and every of their rights, members, and appurtenances. TO HAVE AND TO HOLD the said messuages, farms, lands, tenements, and hereditaments, and all and singular other the premises hereby released, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances, unto the said C. D. his heirs and assigns for ever, to the only proper use and behoof of the said C. D. his heirs and assigns for ever. TO THE INTENT that the said C. D. may be tenant of the freehold of all and singular the said messuages, farms, lands, tenements, and heredita-

And the reversion, &c.

All the estate, &c.

HABENDUM to C. D. in fee.

To make him tenant to the precipe.

ments hereby released, or otherwise assured, or intended so to be, and every part and parcel of the same, with their rights, members, and appurtenances; *to the end* that one or more good and perfect common recovery or recoveries, with double voucher, may be had and suffered of the same hereditaments. *And* for that purpose it is hereby directed, declared, and agreed by and between all the said parties, to these presents, as far as they respectively are interested, that the said C. D. shall permit and suffer the said R. P, or some other person or persons, at the costs and charges in all things of the said T. B. B. his heirs, executors, or administrators, at any time or times hereafter, to sue forth and prosecute against the said C. D, out of his majesty's high court of Chancery, one or more writ or writs of entry *sur disseisin en le post*, returnable before his majesty's justices of the court of Common Pleas at Westminster; and thereby demand of the said C. D. the messuages, farms, lands, tenements, and hereditaments hereby released, or otherwise assured, or intended so to be, with their and every of their rights, members, and appurtenances, by the names, and descriptions of-[*as in the writ of entry*]-or by such other apt, good, sufficient, and proper names, number of messuages, and acres, quantities, qualities, and other descriptions as shall be deemed necessary, proper, sufficient, and requisite to comprise the same. And that the said C. D. shall in his own person, or by his attorney or attornies, lawfully authorised in that behalf, appear to the same writ or writs, and vouch to warranty the said T. B. B. and P. his wife. And that the said T. B. B. and P. his wife shall, in their

Mode of suffering the recovery prescribed.

own persons, or by their attorney or attornies, lawfully authorised in that behalf, appear gratis, and freely enter into the warranty of the said C. D, and taking the same upon themselves vouch over to warranty the common vouchee of the said court of Common Pleas for the time being; who shall appear gratis, and freely enter into the warranty of the said T. B. B. and P. his wife, and after imparlance make default. So that judgment may be given upon the said writ or writs, and every of them, for the said R. P, or other demandant or demandants, to recover all and singular the said messuages, farms, lands, tenements, and hereditaments hereby released or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances, by such names, quantities, qualities, and other descriptions as aforesaid, against the said C. D.; and for the said C. D. to recover in value against the said T. B. B. and P. his wife; and for them the said T. B. B. and P. his wife, to recover in value against the common vouchee, as is usual in like cases. And that upon all and every recovery and recoveries to be suffered as aforesaid, execution may be sued and prosecuted by, and seisin had, taken, and delivered unto the said R. P. or other demandant or demandants, accordingly. And that every other act or thing needful, requisite, or proper to be done and executed for the purpose of suffering and perfecting a common recovery or recoveries of the said messuages, farms, lands, tenements, and hereditaments hereby released, or otherwise assured, or intended so to be, with double, treble, or other voucher, to bar the estate

or interest in tail of the said T. B. B, of and in the same messuages, farms, lands, tenements, and hereditaments, and all reversions and remainders over and expectant upon the same estate or interest in tail, and to extinguish the dower, right and title of dower of the said P. B. may be made, done, and executed. AND by way of direction and declaration, and not of covenant, it is hereby granted, declared, and agreed by and between the said parties to these presents, and they hereby for themselves severally and respectively, and for their several and respective heirs, executors, and administrators, and according to their respective estates, rights, and interests in the premises consent and agree, that the recovery hereby agreed to be suffered shall be suffered and perfected with all possible dispatch; and that they respectively, and their respective heirs, on their respective parts, will use their utmost endeavours to give effect to the same recovery, and also to these presents, and the grant, release, confirmation, or other assurance hereby made. AND IT IS HEREBY FURTHER DIRECTED, declared, and agreed by and between all the parties to these presents, as far as they respectively have any right, title, or interest in the premises, that immediately upon and after judgment obtained, and seisin had and taken upon such recovery as aforesaid, the same recovery, and also these presents, and the assurance hereby made, and all and every fine and fines, recovery and recoveries, and other assurances whatsoever, at any time or times heretofore, and to be at any time, and from time to time hereafter, had, made, done, levied, suffered, executed, and perfected, of or concerning all or any

to bar the estate-tail, &c. and to extinguish dower of the wife.

DIRECTION that recovery shall be suffered;

and that parties will give effect to the same.

DECLARATION that recovery when suffered

the present deed, and all fines, &c.

part of the said messuages, farms, lands tenements, and hereditaments hereby released, or otherwise assured, or intended so to be, either by themselves solely and alone, or jointly and together with any other lands, tenements, or hereditaments, by or between all and every, or any or either of the persons who are parties to these presents, or to which they, or any or either of them is, or are, or shall, or may be parties or privies, or a party or privy, shall, as to all the said parties to these presents respectively, as far as they respectively can lawfully or rightfully direct the uses of the same fine and fines, common recovery and recoveries, and other assurances, be and

shall enure,

enure, and be adjudged, expounded, deemed, decreed, and taken to be and enure, and that the same was and were meant and intended, and is and are hereby directed and declared to be and

and that persons shall stand seised,

enure; and also that the person or persons to whom the said fine or fines, common recovery or recoveries, and other assurances respectively, have or hath been, or shall or may be levied, suffered, made, and executed, shall stand and be

As to the parcels conveyed,

seised, *As to*, for, and concerning the said messuages, farms, lands, tenements, and hereditaments hereby released, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their rights,

To the use of such persons as grantor shall by deed appoint.

members, and appurtenances, *To the uses*, upon the trusts, and for the ends, intents, and purposes hereinafter limited, expressed, and declared of and concerning the same, (that is to say) *To the use* of such person or persons, for such estate or estates, and for such interest or interests, by way of annuity, rent-charge, or otherwise, and in such

parts, shares, and proportions, and upon such trusts, and for such ends, intents, and purposes, and charged and chargeable in such manner, and either absolutely or conditionally, and subject to such powers of revocation and of new appointment, and other powers, provisoes, conditions, restrictions, limitations, declarations, and agreements, as the said T. B. B. at any time or times, and from time to time, by any deed or deeds, to be sealed and delivered by him in the presence of, and attested by one, two, or more credible witness or witnesses, shall direct, limit, or appoint. *And* in default of such direction, limitation, and appointment, and in the mean time, and from time to time until the same shall take effect, and from time to time subject to such uses, estates, trusts, charges, and interests as shall have been directed, limited, or appointed by the said T. B. B. then *To the use* of the said T. B. B. and his assigns for any during the term of his natural life. *And* from and after the determination of that estate by any means, *To the use* of the said R. P. his heirs and assigns, during the natural life of the said T. B. B, *Upon trust* for, and for the sole benefit of the said T. B. B. and his assigns, and to the intent that the present or any future wife of the said T. B. B. may not be entitled to dower. *And* from and after the determination of the estate hereby limited to the use of the said R. P. his heirs and assigns, for the life of the said T. B. B. then *To the use* of the said T. B. B. his heirs and assigns for ever. And to, for, and upon no other use, trust, intent, or purpose whatsoever. *In witness, &c.*

In default of appointment,

To the use of grantor for life,

Remainder

To the use of a trustee for life of grantor, to prevent dower,

Remainder,

To the use of grantor in fee.

FORM V.

Release in Fee of Lands, partly Freehold, and partly of the Tenure of ancient Demesne, that Common Recoveries may be suffered thereof to Uses: with a Release of Right.

THIS INDENTURE, of six parts, made the day of in the forty fifth year of the reign, &c. &c. and in the year of our Lord 1805;

PARTIES. BETWEEN J. R. H. of, &c. yeoman, of the first part; W. B. of, &c. gentleman, of the second part; C. C. of, &c. gentleman, and A. his wife, (late A. H, spinster,) of the third part; J. S. of, &c. gentleman, of the fourth part; T. S. of, &c. of the fifth part; and J. E. of &c. Esq. of the sixth part.

RECITAL of a marriage settlement, creating an estate-tail in part of the lands. WHEREAS by indentures of lease and release, bearing date respectively on or about the 1st and 2d days of September in the year 1727, the indenture of release being tripartite, and made, or expressed to be made, between J. N. and M. his wife, of the first part; W. C. and J. H. of the second part; and J. N. the younger and M. his wife of the third part; (being a settlement made in consideration of the marriage then intended to be, and afterwards solemnized, between the said J. N. the younger, and M. his wife,) the messuage or tenement and hereditaments hereinafter described to be called and situate in H, in the parish of O, in the county of S, were conveyed,

settled, and assured, after, and subject to uses for the life of the said J. N. the younger, and M. his wife, (both of whom long since departed this life) to the use of the first son of the body of the said J. N. the younger, on the body of the said M. his wife begotten, or to be begotten, in tail general, with divers remainders over. And Whereas J. N. was the eldest son of the said J. N. and M. his wife. And Whereas the said J. N, being seised as tenant in tail of the said messuage or tenement and hereditaments, situate in H.; and being also seised to him and his heirs in fee simple of a messuage or tenement and hereditaments with the appurtenances, called otherwise farm, as the devisee in fee thereof named in the will of W. D. his grandfather; and being also seised to him and his heirs in fee-simple of another messuage, farm, lands, and hereditaments called otherwise farm: did by his last will and testament in writing, duly executed and attested for the devise of lands of inheritance, and bearing date on or about the 16th day of December in the year 1760, give and devise his said messuage or tenement, farm, lands, and premises, situate in H. aforesaid, and now called otherwise (charged with an annuity of £ to his wife who is since deceased, for her life,) as soon as his daughter M. should attain the age of twenty-one years, unto his said daughter and her assigns for her life; and from and after the decease of his said daughter, he gave and devised the same unto the heirs of her body, lawfully issuing. But in case the said daughter should not live to attain the

Will of tenant in tail,

devising farm in H. to his daughter M. in tail.

age of twenty-one years, or leave issue of her body lawfully begotten, then the said testator devised his said messuages, lands, and hereditaments at H. in manner therein mentioned. And the said J. N. by his said will, also gave and devised all that his messuage or tenement, farm, lands, and premises in H. aforesaid, called or known by the name of when and as soon as his said daughter M. should attain her age of twenty-one years, unto his said daughter, her heirs and assigns for ever. But in case his said daughter should not live to attain the age of twenty-one years, or leave issue of her body lawfully begotten, then he devised the same messuage or tenement, farm, lands, and premises last mentioned in manner in the said will expressed. AND WHEREAS the said J. N. departed this life on or about the day of in the year of our Lord without having in any manner altered or revoked his said will, leaving his said daughter M. his only child and heir at law. And the said in part recited will of the said J. N. was, after his decease, and on or about the 6th day of July, in the year duly proved in the Consistory Court of the Lord Bishop of W. at W. AND WHEREAS the said M, the daughter of the said J. N. intermarried with D. H. AND WHEREAS by indenture bearing date on or about the 29th day of December, in the year 1781, and made or expressed to be made between the said D. H, and the said M, then the wife of the said D. H, of the one part, and W. B. of the other part; and by a fine *sur conuzance de droit come ceo*, &c. levied in pursuance of an agreement contained in that inden-

Death of testator.

Probate of will.

Marriage of daughter.

Settlement of the estates on daughter's husband.

ture, in the court of ancient demesne of the manor and hundred of O, of which the said messuages, farm, lands, and hereditaments called are holden, All those three several messuages or tenements, farms, lands, and hereditaments hereinafter described, to be called by the names of with the appurtenances, were, or were expressed or intended to be settled and assured to the use of the said W. B. and D. H. their heirs and assigns, nevertheless, as to the estate and interest of the said W. B. and his heirs, of and in the said hereditaments and premises, in trust for the said D. H. his heirs and assigns. But as a fine levied in the court of ancient demesne is not a fine within the statutes under which proclamations are made, such fine was not an effectual bar to the said estates-tail. AND WHEREAS J. H. formerly of, &c. surgeon, by his last will and testament in writing duly executed and attested for the devise of lands of inheritance, and bearing date on or about the 12th day of June, 1782, (amongst other things,) gave and bequeathed unto his son, the said D. H, all his (the said testator's) lands and premises, held by copy of court roll in C, including the tenements then inhabited by S. H. and E, and his house and land in D, likewise the house inhabited by F. J. AND WHEREAS the said J. H. departed this life on or about the day of 1782, without having in any manner altered or revoked his said will, leaving T. H. his eldest son and heir at law. And the same will was, after the death of the said J. H. and on or about the seventh day of March, in the year of our Lord 1791, proved in the court of AND

Fine ineffectual to bar estates-tail.

Will of J. H. devising lands of copyhold tenure to D. H.

Death of testator.

Probate of will.

Admission to copyland lands.

WHEREAS at a court held for the manor and hundred of C. aforesaid, on or about the 28th day of October, in the year 1782, the said D. H. as the son and devisee of the said J. H, was admitted tenant to the several lands, tenements, and hereditaments, late of the said J. H, holden of the said manor and hundred of C. by copy of court roll; to hold to him and his heirs for ever, according to the form and effect of the said will, and according to the custom of the manor and hundred of C. And at the same court, the said D. H. surrendered all the same lands, tenements, and hereditaments, to the use of such person or persons as he in and by his last will and testament should give, devise, direct, limit, and appoint.

Surrender to the use of will.

D. H. the devisee took only an estate for life, for want of words of inheritance.

AND WHEREAS in the devise contained in the said in part recited will of the said J. H, of his said lands held by copy of court roll and other hereditaments, to his said son D. H. no words of inheritance were used, and it is apprehended that the said D. H. took only an estate for life in the said lands and hereditaments under that devise.

D. H. was possessed of ground and buildings for a term.

AND WHEREAS the said D. H. was possessed of or otherwise well entitled to the piece or parcel of ground, with the dwelling-house, edifices, and buildings thereon erected, situate and lying in the parish of C. aforesaid, hereinafter described and also assigned, or otherwise assured, or intended so to be, with the appurtenances, for the residue of a certain term of five hundred years, therein created by indenture, bearing date on or about the 10th day of March in the year 1745. AND WHEREAS the said D. H. by his last will and testament in writing, duly executed and attested

Will of D. H;

for the devise of lands of inheritance, and bearing date on or about the 16th day of December in the year 1784, gave and devised unto his daughter H. her heirs and assigns for ever, all that his copyhold messuage or tenement, buildings and hereditaments, then in the occupation of J. D. and himself, situate and lying in D— street, in C. aforesaid, called or known by the name of H. (being all or part of the said copyhold hereditaments, which were devised to the said D. H. as aforesaid.) And he desired that the lords of the manor of C. aforesaid, or their steward, would admit his wife and his brother-in-law J. M. as guardians of his said daughter H. during her minority. And the said testator also gave and devised unto his daughter A. her heirs and assigns for ever, all those his freehold messuages, lands, tenements, and hereditaments, with their appurtenances, situate in in C. in the occupation of W. C. labourer, and in in C. aforesaid, in the occupation of F. G. labourer; And also all those his ten copyhold tenements, with the buildings, gardens, and appurtenances thereunto belonging, situate and lying in C. aforesaid, and then in the occupation of S. C. and others: to hold to his said daughter A. her heirs and assigns for ever. And the said testator desired that the lords of the manor of C. or their steward, would admit his said wife and his said brother-in-law J. M. as guardians of his said daughter A. during her minority. And the said testator gave and devised unto his son and his heirs, all those his three several freehold farms, with the messuages, buildings, lands, hereditaments, and appur-

devising his copyholds to his daughter H., in fee.

And devising other freehold and copyhold lands to his daughter A. in fee.

And devising to his son, in fee, other freehold lands.

tenances thereto belonging, situate and lying at H. in the parish of O, then in the occupation of himself and H, C. respectively, with the stock, rights, members, and appurtenances, thereto belonging, (subject to certain annuities to the said testator's wife.) But in an event which happened, namely, in case his said son should happen to depart this life before his attainment of the age of twenty-one years, without leaving any lawful issue of his body then living, the said testator gave and devised all his said freehold farms, lands, hereditaments, and premises situate at H. aforesaid unto his said daughter H. her heirs and assigns, subject to a further annuity to his said wife. And if all his said children should happen to depart this life during their minorities, without leaving any lawful issue of their, his, or her bodies or body then living, then the said testator gave, devised, and bequeathed all and every his real and personal estates whatsoever and wheresoever (subject as aforesaid), unto his nephews, the said J. R. H. and J. M. the younger, and F. T. their heirs, executors, administrators, and assigns, for ever, equally to be divided between them, share and share alike, they paying thereout certain annuities thereby given to his said wife. And the said testator appointed his wife M. and his brother T. H, and his brother-in-law J. M. executors in trust of his will, and guardians of all his said children. And Whereas the said D. H. by a codicil to his said will, duly executed and attested for the devise of lands of inheritance, and bearing date on or about the 12th day of May, in the year 1785, in case his said daughters H. H.

Subject to an executory devise to his daughter H. in fee.

And subject to an executory devise of all his estates to J. R. H. J. M. and F. T.

Codicil to the last mentioned will.

and A. H. and his son J. N. H. and all and every of them, should happen to depart this life, without leaving any lawful issue of their, her, or his bodies or body then living, gave, devised, and bequeathed the whole of his estate and effects, both real and personal, of what tenure, nature, or kind soever, unto his said nephews J. R. H, J. M. the younger, and F. T, their heirs, executors, administrators, and assigns for ever, to be equally divided between them, share and share alike, and they to take as tenants in common, and not as joint-tenants, subject to the several payments in his said will expressed, and to all other incumbrances and payments. AND WHEREAS the said D. H. departed this life on or about the day of without having in any manner altered or revoked his said will, otherwise than by the said codicil thereto, and without having altered or revoked that codicil, leaving his said daughters, H. H. and A. H, and his son, the said J. N. H, him surviving; And the said in part recited will and codicil were afterwards, and on or about the day of duly proved in the court of AND WHEREAS by indentures of lease and release, bearing date respectively on or about the 28th and 29th days of September, in the year 1786, and made or expressed to be made between the said T. H. of the one part, and the said M. H. and J. M. (and which said M. H, J. M, and T. H, are therein described to be executors in trust named in the said will of the said D. H.) of the other part; it is witnessed, that in consideration of £ to the said T. H. paid by the said M. H. and J. M,

Death of testator.

Probate of will and codicil.

Conveyance of estates, purchased with trust-money, to the use of the infant children of D. H. in fee.

being part of the trust money arising under the will of the said D. H, the two messuages or tenements hereinafter mentioned to have been purchased of and from the said T. H, with the appurtenances, were conveyed and assured by the said T. H. unto the said M. H. and J. M; in trust for, and to the use of the said J. N. H, H. H. and A. H, the infant children of the said D. H. their heirs and assigns for ever. And Whereas by indenture of assignment, bearing date on or about the 29th day of September, in the year 1786, and made or expressed to be made between the said T. H. of the one part, and the said M. H. and J. M. (and which said T. H, M. H. and J. M. are therein described as executors as aforesaid,) of the other part; the four pieces or parcels of land hereinafter described, and assigned, or otherwise assured or intended so to be, with the appurtenances, were, for the considerations therein mentioned, assigned by the said T. H. unto the said M. H. and J. M. their executors, administrators, and assigns for the residue of two several terms of one thousand years, and one thousand years therein, in trust for the said J. N. H, H. H. and A. H, their respective executors, administrators, and assigns, subject to the rents and covenants in the original indentures of demise contained. And Whereas by indenture bearing date on or about the 16th day of March, in the year 1787, and made or expressed to be made between H. L. of the one part, and the said J. M. of the other part, and by livery of seisin made according to the form and effect of the same indenture, the messuage or tenement and hereditaments hereinafter mentioned to

Assignment of leasehold lands in trust for the infants.

Feoffment of messuages, &c. to J. M. *in fee.*

have been purchased of and from the said H. L, and hereinafter released, or otherwise assured or intended so to be, with the appurtenances, were, in consideration of £ paid by the said J. M. to the said H. L, granted, enfeoffed, and conveyed by the said H. L. unto and to the use of the said J. M. his heirs and assigns for ever. AND WHEREAS by a deed poll, or memorandum indorsed on the last in part recited indenture, and being under the hand and seal of the said J. M, and bearing date on or about the 14th day of July, in the year 1791, after reciting that the sum of £ , paid to the said H. L. by the said J. M, was not the proper money of the said J. M, and that the same was part of the residue of the personal estate and effects of the said D. H. and by him given and bequeathed as aforesaid, the said J. M, in consideration of the premises, did declare and agree, that the same messuage, hereditaments, and premises, were granted and conveyed to, and his name used only, in trust with them the said T. H. and M. H, for such uses, intents, and purposes, as were mentioned, expressed, and declared in the said will of the said D. H, of and concerning other the messuages, hereditaments, and premises, in the said will mentioned. And he did thereby declare and agree, that the said messuage, hereditaments, and premises should at all times thereafter remain, continue, and be to the same uses, upon the same trusts, and for the same ends, intents, and purposes as other the messuages or tenements, hereditaments and premises, late of the said D. H. were subject and liable to under and by virtue of his said will, freed and absolutely

Deed poll, declaring trusts under the will of D. H.

discharged from all manner of incumbrances made, done, or suffered, or thereafter to be made, done, or suffered by him the said J. M. his heirs, executors, administrators, or assigns. And Whereas the said J. N. H. departed this life on or about the 16th day of August in the year 1791, under the age of twenty-one years, and without leaving any issue of his body lawfully begotten. And Whereas the said H. H. departed this life on or about the 27th day of March, 1792, under the age of twenty-one years, and without leaving any issue of her body lawfully begotten. And Whereas the said A. H. attained the age of twenty-one years on or about the 3d day of December, in the year of our Lord 1803, and on or about the 7th day of May in the year 1805, intermarried with the said C. C. her husband. And Whereas the said T. H. departed this life on or about the day of in the year of our Lord 1805. And the said J. R. H. is the eldest son, and heir at law, and customary heir of the said T. H: and as such is the customary heir of the said J. H. And Whereas the said J. R. H. hath elected to take the said several copyhold and other hereditaments, which under the devise in the said in part recited will of the said J. H. passed to the said D. H. for his life only, and to which the said J. R. H. is now become entitled as the heir at law of the said J. H. as aforesaid, and to disclaim and release all his estate, right, title, and interest in and to the share to which he is entitled, subject to such contingency as aforesaid, under the will of the said D. H, of and in the other real estates, late of the said D. H, and

Death of the son of D. H, under age, and without issue.

Death of H, a daughter of D. H. under age and without issue.

A. the other daughter of D. H. attained 21, and married,

Death of T. H. J. R. H. is heir to J. H.

Election of J. R. H. to take copyhold and to release his title to other estates.

which have been purchased by and out of his personal estate since his decease as aforesaid, and also of and in the residue of the personal estate late of the said D. H, and hath agreed to release his share, estate, and interest, of, in, and to all other the real and personal estates, late of the said D. H. unto the said A. C. her heirs, executors, administrators, and assigns, or in such manner as she shall direct or appoint. AND WHEREAS the said C. C. and A. his wife are desirous of suffering a common recovery of the several messuages, farms, lands, and hereditaments hereinafter described and released, or otherwise assured or intended so to be, and called by the respective names of otherwise and otherwise with the appurtenances in the court of ancient demesne, whereof the same are holden; and a recovery of the other messuages, lands, and hereditaments hereinafter described and released, or otherwise assured or intended so to be, (not being of that tenure) in his majesty's court of Common Pleas, at Westminster; and of settling the same messuages, farms, lands, tenements, and hereditaments respectively, as far as they are interested therein, to the uses hereinafter expressed and declared of and concerning the same hereditaments respectively. And the said J. R. H. hath at their request agreed to join the conveyance of the several messuages, farms, lands, tenements, and hereditaments, respectively, for the purpose of releasing and extinguishing all his estate, share, and interest therein, and also to assign and release unto the said C. C. and A. his wife all his share and interest in the personal

Desire of parties to suffer recoveries;

and to settle the lands to uses.

Agreement of J. R. H. to join in the conveyance, and to release his interest.

estate, late of the said D. H. in such manner as is hereinafter expressed. And the said W. B. hath also agreed to join in these presents for the purpose of transferring all the estate (if any) in the said lands of the tenure of ancient demesne, and comprised in the said fine which are now vested in him. NOW THIS INDENTURE WITNESSETH, that for docking, barring, and destroying all estates and interests in tail of and in the several messuages, farms, lands, and hereditaments hereinafter described, and hereby released or otherwise assured or intended so to be, and all reversions, and remainders expectant or depending on the same estates or interests in tail, and all conditions and collateral limitations annexed thereto; and for settling and assuring the same messuages, farms, lands and hereditaments respectively, to the uses hereinafter limited and declared of and concerning the same, and for giving effect to such election of the said J. R. H, as hereinbefore recited; *And also* in consideration of ten shillings of lawful money, current in Great Britain, to each of them the said J. R. H, W. B, C. C. and A. his wife, well and truly paid by the said J. S. immediately before the execution of these presents, (the receipt whereof is hereby acknowledged,) The said J. R. H. and W. B, (at the request and by the direction and appointment of the said C. C. and A. his wife, testified by their respective executions of these presents,) and also the said C. C. and A. his wife, according to their respective shares, estates, rights, and interests in the premises, but no further or otherwise, *have*, and each and every of them *hath*, bargained, sold, and released, and by these presents

Agreement of the conusee of fine to join in conveyance.

WITNESSETH that for barring estates-tail, &c.

and settling the lands to uses, and giving effect to election.

and for nominal considerations.

The parties according to their estates,

release to J. S. in fee.

do, and each and every of them *doth* bargain, sell, and release unto the said J. S. his heirs and assigns, (in the actual possession of the said J. S. now being, in virtue of a bargain and sale thereof made to him by the said J. R. H, W. B, C. C. and A. his wife, in consideration of five shillings, paid to each of them by the said J. S, by indenture bearing date on the day next before the day of the date, and executed before the execution of these presents, for one whole year, to be computed from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession), ALL, &c. [*Here the parcels were inserted.*] *And all* houses, cottages, outhouses, edifices, buildings, barns, stables, yards, gardens, orchards, closes of land, meadow and pasture, feedings, woods, underwoods, and the ground and soil thereof, commons, and common of pasture, and of turbary, and other commonable rights, hedges, ditches, fences, mounds, ways, paths, waters, water-courses, liberties, privileges, easements, profits, commodities, advantages, and emoluments, whatsoever, to the said messuages, farms, lands, and hereditaments hereby released, or otherwise assured or intended so to be, or any of them respectively belonging, or in any wise appertaining, or accepted, reputed, deemed, taken, known, held, occupied, or enjoyed, as part, parcel, or member of the same, or any of them respectively. *And* the reversion and reversions, remainder and remainders, yearly and other rents and profits of the said messuages, farms, lands, hereditaments, and premises hereby released, or otherwise assured, or

(reference to lease for a year)

PARCELS.

General words for farms.

Reversion, &c.

intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances. *And* all the estate, right, title, interest, use, trust, inheritance, term, and terms for life or lives, property, possession, possibility, benefit, and equity of redemption, claim, and demand, whatsoever, at law and in equity, or otherwise howsoever, of them, the said J. R. H, W. B, and C. C, and A. his wife, and of each and every them, of, in, to, and out of the said messuages, farms, lands, hereditaments, and premises hereby released, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances. TO HAVE AND TO HOLD the said messuages, farms, lands, hereditaments, and all and singular other the premises hereby released, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances, unto the said J. S, his heirs and assigns; discharged of and from all estate, right, title, and interest, of the said J. R. H. in or to the same messuages, farms, lands, and hereditaments, or any of them, or any part or share thereof; but subject and without prejudice to any right, title, or interest, which the said J. M. and J. T. and each or either of them, can or may have, or claim, under or by virtue of the last will and testament of the said D. H, *Nevertheless, to the uses*, and for the ends, intents, and purposes, hereinafter expressed and declared (that is to say) *As to*, for, and concerning such, and so many, and such part and parts, of the said messuages,

All the estate, &c.

HABENDUM to J. S. in fee;

discharged from all the right of J. R. H,

but without prejudice to the rights of other persons.

As to lands of ancient demesne,

farms, lands, hereditaments, and premises hereby released, or otherwise assured or intended so to be, as are within the jurisdiction of the court of ancient demesne of the manor and hundred of O. aforesaid, with the appurtenances, *To the use* of the said J. S. his heirs and assigns, for ever. *And as to*, for, and concerning all other the messuages, farms, lands, hereditaments, and premises hereby released or otherwise assured or intended so to be, with the rights, members, and appurtenances, not being within the jurisdiction of the said court of ancient demesne, *To the use* of the said T. S. his heirs and assigns for ever. To THE INTENT that the said J. S. and T. S. respectively may be tenants of the freehold of all and singular the messuages, farms, lands, hereditaments, and premises hereby limited in use to them the said J. S. and T. S. respectively, and every part and parcel of the same respectively, with their respective rights, members and appurtenances, *to the end* that two or more good and perfect common recoveries, with double voucher, may be had and suffered of the same lands and hereditaments respectively. *And* for that purpose, it is hereby directed, declared, and agreed, by and between all the said parties to these presents, as far as they respectively are interested, that the said J. S. shall permit and suffer the said J. E. or some other person or persons, at the costs and charges in all things of the said C. C. his heirs, executors, or administrators, at any time or times hereafter, to sue forth and prosecute against him the said J. S. out of his majesty's high court of Chancery one or more writ or writs of *right close* directed to the of

To the use of J. S. in fee. And as to the other lands,

To the use of T. S. in fee.

To make them tenants to the præcipe for suffering two recoveries.

One recovery to be suffered on a writ of right close, in the court of ancient demesne;

the said manor and hundred of O, and to be duly returned, and make protestation to prosecute the same writ in nature of a writ of entry, *sur disseisin en le post*, and thereby demand of the said J. S. such and so many and such part and parts of the several messuages, farms, lands, hereditaments, and premises hereby released or otherwise assured, or intended so to be, as are within the jurisdiction of the said court of ancient demesne, and hereby limited in use to the said J. S. with their and every of their rights, members, and appurtenances, by such apt, good, sufficient, and proper names, number of messuages and acres, quantities, qualities, and other descriptions as shall be deemed necessary, proper, sufficient, and requisite, to comprise the same; *and* the said T. S. shall permit and suffer the said J. E, or some other person or persons, at the costs and charges, in all things of the said C. C. his heirs, executors, or administrators, at any time or times hereafter to sue forth and prosecute against him the said T. S, out of his majesty's high court of Chancery, one or more writ or writs of entry, *sur disseisin en le post*, returnable before his majesty's justices of the court of Common Pleas at Westminster, and thereby demand of the said T. S. such and so many, and such part and parts, of the messuages, farms, lands, hereditaments, and premises hereby released, or otherwise assured or intended so to be, as are not of the tenure of ancient demesne, and as are hereby limited in use to the said T. S, with their rights, members, and appurtenances, by such good, sufficient, and proper names, number of messuages, and acres, quantities, qualities, and

The other recovery to be suffered on a writ of entry, in the Common Pleas.

other descriptions, as shall be deemed necessary, proper, sufficient, and requisite to comprise the same. *And* that the said J. S. and T. S. respectively shall in their own persons, or by their attorney or attornies, lawfully authorised in that behalf, appear to the same writs respectively, and vouch to warranty the said C. C. and A. his wife. And that the said C. C. and A. his wife shall in their own persons, or by their attorney or attornies lawfully authorised in that behalf, appear gratis and freely enter into the warranty of the said J. S. and T. S. respectively; and taking the same upon themselves, vouch over to warranty the common vouchee for the time being of the said courts of ancient demesne and Common Pleas respectively. And such common vouchees respectively shall appear gratis, and freely enter into the warranty of the said C. C. and A. his wife; and after imparlance make default. So that judgment may be given upon the said writs respectively, and every of them for the said J. E. or other demandant or demandants therein respectively, to recover all and singular the said messuages, farms, lands, hereditaments, and premises hereby released, or otherwise assured or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances, by such names, qualities, quantities, and other descriptions as aforesaid, against the said J. S. and T. S. respectively; and for them respectively to recover in value, against the said C. C. and A. his wife; and for the said C. C. and A. his wife to recover in value against the common vouchees respectively, as is usual in such cases.

Mode of prosecuting both recoveries prescribed,

And that upon all and every recovery and recoveries, to be suffered as aforesaid, execution may be sued and prosecuted by, and seisin had, taken, and delivered unto the said J. E. or other demandant or demandants accordingly. And that every other act or thing requisite or proper to be done or executed for the purpose of suffering and perfecting two or more common recoveries of the several messuages, farms, lands, hereditaments, and premises respectively hereby released or otherwise assured or intended so to be, with double, treble, or other voucher, to dock the estates or interests in tail of the said A. C. of and in the said several messuages, farms, lands, hereditaments, and premises, and all reversions and remainders over and expectant upon the same estates or interests in tail, and to transfer and settle the same messuages, farms, lands, and hereditaments to the uses hereinafter limited, expressed, and declared thereof, may be made, done, and executed. *And* by way of direction and declaration, and not of covenant, it is hereby granted, declared, and agreed, by and between the parties to these presents, and they hereby for themselves, severally and respectively, and for their several and respective heirs, executors, and administrators, consent and agree, according to their respective estates, rights and interests, in the premises, that the recoveries hereby agreed to be suffered, shall be suffered and perfected with all possible dispatch; and that they respectively and their respective heirs, on their respective parts, will use their utmost endeavours to give effect to the same recoveries, and also to these presents, and

to bar the estates-tail, &c.

and transfer and settle the lands to uses.

Direction that recoveries shall be suffered,

and that parties will give effect to the same.

the grant, release, confirmation, or other assurance hereby made. AND IT IS HEREBY FURTHER DIRECTED, declared, and agreed, by and between all the parties to these presents, as far as they respectively have any right, title, or interest in the premises, that immediately upon and after judgment obtained, and seisin had and taken upon each of such recoveries as aforesaid, each of the recoveries respectively, so as aforesaid, or in any other manner, or at any other time or times, to be suffered ; and also the bargain and sale for a year, bearing date on the day next before the day of the date of these presents ; and also these presents, and the assurance hereby made ; and all and every other fine and fines, recovery and recoveries, and other assurances whatsoever, at any time or times heretofore, and to be at any time, and from time to time hereafter had, made, done, levied, suffered, and perfected, of or concerning all or any part of the said messuages, farms, lands, hereditaments, and premises, hereby released, or otherwise assured or intended so to be, either by themselves, solely and alone, or jointly and together with any other lands, tenements, or hereditaments whatsoever, by or between all and every, or any or either of the persons who are parties to these presents, or to which they or any or either of them is or are, or shall or may be parties or privies, or a party or privy, shall, as to all the said parties to these presents respectively, as far as they respectively can lawfully or rightfully direct the uses of the same fine or fines, common recovery or recoveries, and other assurances, be and enure, and be adjudged, expounded, deemed, decreed, and taken

Declaration that the recoveries when suffered ;

the lease for a year, and present deed,

and all other fines, &c.

shall enure,

to be and enure, and that the same was and were meant and intended, and is and are hereby directed and declared to be and enure; and also that the person or persons to whom such fine or fines, common recovery or recoveries, and other assurances, respectively, have or hath been or shall or may be levied, suffered, made, and executed, shall stand and be seised, *As to*, for, and concerning the said messuages, farms, lands, hereditaments, and premises, hereby released, or otherwise assured or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances, (subject, and without prejudice as aforesaid) *To the uses*, upon the trusts, and for the ends, intents, and purposes, hereinafter limited and declared of and concerning the same, that is to say, *To the use* of such person or persons, for such estate or estates, and for such interest or interests, by way of annuity, rent charge, or otherwise, and in such parts, shares, and proportions, and upon such trusts, and for such ends, intents, and purposes, and charged and chargeable, in such manner, and either absolutely or conditionally, and subject to such powers of revocation and of new appointment and other powers, provisoes, conditions, restrictions, limitations, declarations, and agreements, as the said C. C. and A. his wife, at any time or times, and from time to time, during their joint lives, by any deed or deeds, instrument or instruments in writing, to be sealed and delivered by them in the presence of two or more credible witnesses, and attested by the same witnesses, shall jointly direct, limit, or appoint. *And* in default of such direction, limi-

and persons shall stand seised,

As to the lands conveyed

To the use of such persons, &c. as husband and wife shall jointly appoint.

In default of

tation, and appointment, and in the mean time and from time to time, until the same shall take effect, and from time to time subject to such uses, trusts, charges, and interests as shall have been directed, limited or appointed by the said C. C. and A. his wife jointly ; *then To the use* of the said C. C. and A. his wife, their heirs and assigns, for ever; and to no other use, and upon no other trust, nor for any other end, intent, or purpose whatsoever. AND THIS INDENTURE ALSO WITNESSETH that in pursuance and further performance of the said agreement on the part of the said J. R. H, and in consideration of 10s. of like lawful money as aforesaid, to the said J. R. H. well and truly paid by the said C. C. and A. his wife, immediately before the execution of these presents, (the receipt whereof is hereby acknowledged,) The said J. R. H. *hath* remised, released, quit-claimed, and also bargained, sold, and assigned, and by these presents *doth* remise, release, quit-claim, and also bargain, sell, and assign unto the said C. C. and A. his wife, their heirs, executors, adminstrators, and assigns, *All* the estate, right, title, interest, term and terms of years, benefit, property, and possiblity, at law and in equity, or otherwise howsoever, of him the said J. R. H, of in, to, and out of all the said freehold and leasehold messuages, lands, tenements, hereditaments, real estate, and residue of the personal estate and effects, and other property late of the said D. H, devised and bequeathed by his said will and codicil, or which were purchased in manner hereinbefore mentioned, and of, in, to, and out of every part

appointment.

To the use of husband and wife, in fee.

INDENTURE FURTHER WITNESSETH that for nominal consideration J. R. H. releases and assigns to husband and wife.

all his estate, &c. in freehold and leasehold messuages, &c.

and parcel of the same, so and in such manner, that the said J. R. H. may henceforth be excluded of and from all share, right, and interest, of, in, and to the same real and personal estates, and the same may be discharged of and from all claims and demands whatsoever, of him the said J. R. H. And the said W. B. doth hereby for himself, his heirs, executors, and administrators, covenant, declare, and agree, to and with the said C. C. and A. his wife, their heirs and assigns, that he the said W. B. hath not at any time or times heretofore made, done, executed, committed, or willingly or knowingly suffered any act, deed, matter, or thing whatsover, whereby or by reason or means whereof the said messuages, farms, lands, and hereditaments, hereby released, or otherwise assured or intended so to be, or any part thereof, are, is, can, shall, or may be impeached charged, incumbered, or in any wise affected in title, charge, estate, or otherwise howsoever. And the said J. R. H. doth by these presents for himself, his heirs, executors, and adminstrators covenant and declare to and with the said C. C. and A. his wife, their heirs, executors, administrators, and assigns, that he the said J. R. H. hath not at any time or times heretofore, made, done, executed, committed, or willingly or knowingly suffered any act, deed, matter, or thing whatsoever, whereby, or by reason or means whereof, the said messuages, farms, lands, hereditaments, and premises hereby released, or otherwise assured or intended so to be, or the said leasehold pieces or parcels of land, and other the personal estate hereby released and

Covenant by a releasing party that he hath not incumbered.

The like by another party.

assigned or intended so to be, or any part of the same respectively, shall or may be impeached, charged, incumbered, or in any wise affected in title, charge, estate, or otherwise howsoever. *In witness, &c.*

FORM VI.

Recovery Deed for three Recoveries, in different Counties, of Shares in the New River, when the Object is to preserve Contingent Remainders; and also to prevent Merger; and correct the Intention of a Testator in the Dispositions made by his Will.

Though this deed was supposed to concern equitable Estates, yet as that was not ascertained, it was prepared as if the Estates had been legal (a).

THIS INDENTURE of seven parts, made the 2d day of July A. D. 1805, and 45 Geo. III. &c. BETWEEN J. W. of, &c. Esq. and J. F. of, &c. merchant, of the first part; E. W. of, &c. spinster, of the second part; the said J. W. of the third part; J. H. of, &c. gentleman, of the fourth part; J. M. of, the same place, gentleman, of the fifth part; E. G. of, &c. merchant, of the sixth part; and J. G. of, &c. Esq. of the seventh part. PARTIES.

WHEREAS J. W. late of, &c. Esq. deceased, was at the date and publication of his will, hereinafter recited, and also at his death, seised of, or otherwise intitled to a moiety of two 36th parts, (being a share he purchased of the Right Honorable Elizabeth Lady Viscountess B,) and a moiety of one other 36th part, (being a share he purchased of W. P. H. Esq. and others,) and a moiety of one RECITES the seisin in fee of a former owner of a moiety of different shares, in the king's moiety, and adventurer's moiety, of the New River.

(a) See p. 114 of the text.

other 36th part, (being a share he purchased of the Honorable F. W. and C. his wife,) of and in that moiety or half part of the New River water-cut and stream brought from C. and A. in the counties of H. and M. or one of them to L. and other places adjacent, commonly called the King's Moiety, and the profits, advantages, and hereditaments thereto belonging; And was also seised of or intitled to one full 36th share of that moiety of the said water-cut and stream and hereditaments, which is called the Adventurer's Moiety.

Will of the former owner,

And Whereas the said J. W. by his last will and testament in writing duly executed and attested for the devise of lands of inheritance, and bearing date on or about the 31st day of March in the year 1803; (amongst other things) gave, devised, and bequeathed unto his dear son, the said J. W. and to his friend, the said J. F. and the survivor of them, and to the heirs of such survivor, all that his (the said testator's) part or share, commonly called a King's Share, of and in the New River, with the rights, members, and appurtenances: Upon trust to pay the interest, dividends, and produce arising therefrom, unto his daughter the said E. W. for and during her natural life. And from and after her decease, he gave and devised the said part or share called a King's Share, with the appurtenances, unto and amongst the children of his said daughter in equal shares and proportions, and if but one child, then to such only child. But in case his said daughter should happen to die without leaving issue, then he gave and devised the said part and share called a King's Share, with the appurtenances unto his

devising his share called a King's share, to his son and another, for the benefit of his daughter and her children:

said son J. W. his heirs and assigns, or in case of his death, to his children, share and share alike. And after bequeathing divers pecuniary legacies, the said testator, by his said will, gave, devised, and bequeathed all the rest, residue, and remainder of his real and personal estate, whether freehold, copyhold, or leasehold, or of whatever nature or kind soever, or wheresoever, which he might be possessed of, or any ways intitled to, at the time of his decease, unto his son the said J. W. his heirs, executors, administrators, and assigns for ever, according to the nature and tenure of his said estates and effects. And the said testator appointed his said son J. W. to be sole executor of his said will. AND WHEREAS the said testator J. W. departed this life without having in any manner revoked or altered his said in part recited last will and testament. *And* the same last will and testament, was after his decease, and on or about the day of duly proved in the Prerogative Court of the Archbishop of Canterbury. AND WHEREAS it is apprehended, that the devise to the said J. W. and J. F. upon trust as aforesaid, contained in the said in part recited will, may be construed to extend to the whole of the share and interest which the said testator J. W. had at the time of his decease in that part of the New River called the King's Moiety; and that the said E. W. is seised of an estate-tail in remainder under the limitations or dispositions contained in the will of her said father. AND WHEREAS the legal estate of the said New River water-works and shares therein is or is understood to be vested in the Governor and

and devising the residue of his real and personal estates to his son.

Death of testator,

and probate of his will

Apprehended that, the devise extended to all the testator's interest in the king's moiety.

Legal estate vested in the company.

Company of the said New River in their corporate capacity. AND WHEREAS the said E. W. is fully satisfied that the intention of her said father in making such devise was to give to the said J. W. and J. F. in trust for her and her children as aforesaid, a share or shares equal to one 36th part or share of the said King's Moiety in the said New River and no more. *And* the said E. W. is desirous and hath agreed, in order to remove all doubts and difficulties which may arise upon the construction of the said devise, to settle and assure all the shares and interests late of her said father in the King's Share of the said New River, according to such his supposed intention, and for that purpose to suffer a recovery of the said shares and hereditaments. AND WHEREAS in order to render such recovery effectual as far as the said J. W. is interested, he and (at the request of the said J. W. and E. W.) the said J. F. have agreed to join in these presents in such manner as hereinafter is expressed. NOW THIS INDENTURE WITNESSETH, that in pursuance of the several agreements hereinbefore mentioned, and for docking, barring, destroying, and extinguishing all estates-tail, of and in the several parts, shares, and interests in the New River, and the profits thereof and other hereditaments hereinafter mentioned, and released or otherwise assured or intended so to be, and all reversions and remainders expectant upon such estates-tail, and all conditions and collateral limitations annexed thereto; and for settling and assuring the same parts, shares, and hereditaments, respectively, to the uses, upon the trusts, and for the ends, intents, and purposes

Agreement to suffer recovery to rectify a supposed mistake in the will.

Agreement of the son and the other trustee to join.

Witnesseth that for barring estates-tail, &c.

and settling the shares to uses,

hereinafter limited, expressed, and declared of and concerning the same; and in consideration of ten shillings of lawful money current in Great Britain to each of them the said J. W, J. F. and E. W, well and truly paid by the said J. H, immediately before the execution of these presents, (the receipt whereof is hereby acknowledged,) The said J. F. at the special instance and request, and with the privity, consent, and approbation, and by the direction and appointment of the said J. W. and E. W, testified by their severally executing these presents, *hath* bargained, sold and released, and by these presents *doth* bargain, sell, and release; And the said J. W. and E. W, according to their respective estates, rights, and interests in the premises, *have* and each of them *hath* granted, bargained, sold, aliened, released, ratified, and confirmed, and by these presents *do* and each of them *doth* grant, bargain, sell, alien, release, ratify, and confirm, unto the said J. H. his heirs and assigns, (in the actual possession of the said J. H. now being, in virtue of a bargain and sale thereof made to him by the said J. F, J. W. and E. W, in consideration of five shillings paid to each of them by the said J. H, by indenture bearing date on the day next before the day of the date, and executed before the execution of these presents, for one whole year, to be computed from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession,) ALL that one full and equal moiety, half part, or share, late of the said J. W. of, in and to *all* those two full and intire six-and-thir-

and for nominal consideration.

Trustee, by direction of the son and daughter,

releases;

and the son and daughter

grant, &c.

(reference to lease for a year)

A moiety of two 36th shares,

And a moiety of another 36th share.

tieth parts or shares; *And* all that one full and equal moiety, half part, or share, late of the said J. W. of, in, and to *all* that one other full and

The like,

intire six-and-thirtieth part or share; *And also* all that one full and equal moiety, half part, or share, late of the said J. W. of, in, and to *all* that one other full and intire six-and-thirtieth part or

in the King's Moiety of the New River.

share, of and in *All* that moiety or half part of the New River water-cut and stream, and the profits thereof, brought from C. and A. in the counties of H. and M. or one of them, to L. and other places adjacent, commonly called the King's Moiety, (the said moiety or half, into six-and-thirty parts, or equal shares to be divided,) and also of and in the King's Moiety of all hereditaments whatsoever relating unto or concerning the said New River cut or stream, and of and in all manner of profits, advantages, and commodities whatsoever, thereof, or by means or reason thereof, in any sort to be paid, raised, and gotten; *And also* of and in the King's Moiety or half part of all fines, sums of money, rents, reversions, benefits, and commodities whatsoever, which at any time or times hereafter shall or may be raised, had, made, levied, or gotten, by means of the said New River water or water-works, or of, or by reason of the conveyance of the water thereof, in or by any parts or places, or unto or for any person or per-

And all other shares late of the testator in the same moiety.

sons whomsoever, *And* all and singular other the parts, shares, and interests, late of the said J. W, of, in, and to the said moiety, or half part, called the King's moiety, of the said New River water-cut and stream, and the profits thereof, and the commodities, hereditaments, and appurte-

nances, to the same belonging or appertaining. *And* the reversion and reversions, remainder and remainders, yearly and other rents and profits of the said hereby, or hereby intended to be released, parts, shares, and hereditaments, and every part and parcel of the same, with the appurtenances. Reversion, &c.

To HAVE AND TO HOLD the said parts or shares hereinbefore mentioned, and hereby released, or otherwise assured, or intended so to be, of and in the said moiety of the said New River water-cut and stream, and the profits thereof, called the King's Moiety, hereditaments, and all and singular other the premises hereinbefore mentioned, and hereby released, or otherwise assured, or intended so to be, and every part of the same, with their and every of their rights, members, and appurtenances, unto the said J. H. his heirs and assigns, during the natural life of the said E. W. *To the uses* hereinafter limited and declared; that is to say, *To the use* of the said J. H. and his assigns during the joint natural lives of the said J. H. and E. W. *And* from and after the determination of that estate, and in the mean time subject thereto, and until the recoveries hereby agreed to be suffered shall be suffered, *To the uses* hereinafter limited and declared of the recoveries hereby agreed to be suffered. AND IT IS HEREBY DECLARED and agreed, that the estate hereby limited to the use of the said J. H. and his assigns, during the joint lives of himself and the said E. W, is so limited to him and them, *To the intent* that the said J. H. may be tenant of the freehold of all and singular the said several parts and shares hereby released, or otherwise assured, or intended so to be, of and in the said King's Moiety, of the

HABENDUM to J. H. his heirs and assigns during the life of the daughter.

To the use of J. H. during the joint lives of himself and the daughter. Remainder

To uses declared of the recovery.

DECLARATION that the estate is limited to the use of J. W. for the joint lives to make him tenant to the præcipe,

said New River water-cut and stream, and the profits thereof, hereditaments, and premises, and every part and parcel of the same, with their rights, members, and appurtenances; *to the end* that three or more good and perfect common recoveries, with double voucher may be had and suffered of the same parts, and shares, and hereditaments. *And* for that purpose it is hereby directed, declared, and agreed, by and between all the said parties to these presents, as far as they respectively are interested, that the said J. H. shall permit and suffer the said J. M. or some other person or persons, at the costs and charges in all things, of the said J. W. his heirs, executors, or administrators, at any time or times hereafter to sue forth, and prosecute against him the said J. H, out of his majesty's high court of Chancery, three or more writs of entry, *sur disseisin en le post*, returnable before his majesty's justices of the court of Common Pleas, at Westminster; and by one or more of the said writs, demand of the said J. H. the parts and shares hereby released or otherwise assured, or intended so to be, of such and so many, and such part and parts of the said King's Moiety of the New River water-cut and stream, profits, and hereditaments, as are situate, lying, and being, or arising and to be had and taken in the said county of H, with the appurtenances; and by one or more of the said writs, demand of the said J. H. the parts and shares hereby released, or otherwise assured, or intended so to be, of such, and so many, and such part and parts, of the said King's Moiety of the said New River water-cut and stream profits, and here-

for suffering three recoveries.

One writ to be sued for the parts situate in the county of H.

One for the part in the county of M.

ditaments as are situate, lying, and being, or arising and to be had and taken in the said county of M.; and by one or more of the said writs, demand of the said J. H. the parts and shares hereby released or otherwise assured, or intended so to be, of such, and so many, and such part and parts, of the said King's Moiety of the said New River water-cut and stream, profits and hereditaments as are situate, lying, and being, or arising and to be had and taken within the city of L.; and demand the said shares respectively, by such apt, good, sufficient, and proper names, quantities, qualities, and other descriptions as shall be deemed necessary, proper, sufficient, and requisite to comprise the same. And that the said J. H. shall in his own person, or by his attorney or attornies, lawfully authorised in that behalf, appear to each of the same writs respectively, and vouch to warranty the said E. W. And that the said E. W. shall in her own person, or by her attorney or attornies, lawfully authorised in that behalf, appear gratis, and freely enter into the warranty of the said J. H.; and taking the same upon herself, vouch over to warranty the common vouchee of the court of Common Pleas, for the time being; who shall appear gratis, and freely enter into the warranty of the said E. W, and after imparlance make default. So that judgment may be given upon each of the said writs, for the said J. M, or other demandant or demandants, to recover all and singular the parts and shares hereby released or otherwise assured, or intended so to be, of and in such and so many and such part and parts of the moiety of the said New River water-cut and

and one for the part in the city of L.

Mode of prosecuting all the recoveries prescribed.

stream, profits and hereditaments, called the King's Moiety, as shall be demanded by the same writs respectively, with their rights, members, and appurtenances, against the said J. H.; and for the said J. H. to recover in value against the said E. W.; and for the said E. W. to recover in value against the common vouchee, as is usual in such cases. And that upon all and every recovery and recoveries to be suffered as aforesaid, execution may be sued and prosecuted by, and seisin had, taken, and delivered unto the said J. M. or other demandant or demandants accordingly. And that every other act or thing needful, requisite, or proper to be done or executed for the purpose of suffering and perfecting a common recovery or recoveries of the parts and shares, hereditaments and premises, hereby released, or otherwise assured, or intended so to be, with double, treble, or other voucher, to bar the estate tail of the said E. W. of and in the said parts, shares, hereditaments, and premises, and all reversions and remainders over and expectant upon the same estate, may be made, done and executed. *And* by way of direction and declaration, and not of covenant, it is hereby granted, declared, and agreed, by and between the parties to these presents, as far as they respectively are interested, and they hereby or themselves, severally and respectively, and for their several and respective heirs, executors, and administrators, consent, and agree, according to their respective estates, rights, and interests, in the premises, that the recoveries hereby agreed to be suffered, shall be suffered and perfected with all possible dispatch; and that they respectively,

to bar the estate-tail, &c.

Direction that recoveries shall be suffered.

and that the

and their respective heirs, on their respective parts, will use their utmost endeavours to give effect to the same recoveries, and also to these presents, and the grant, release, confirmation, or other assurance hereby made. AND IT IS HEREBY FURTHER DIRECTED, declared, and agreed by and between all the parties to these presents, as far as they respectively have any right, title, or interest in the premises, that immediately upon and after judgment obtained, and seisin had and taken upon each such recovery as aforesaid, each recovery so as aforesaid or in any other manner, or at any other time or times to be suffered; and also the bargain and sale for a year, bearing date on the day next before the day of the date of these presents; and also these presents, and the assurance hereby made; and all and every other fine and fines, recovery and recoveries, and other assurances whatsoever, at any time or times heretofore, and to be at any time, and from time to time hereafter, had, made, done, levied, suffered, executed, and perfected, of or concerning all or any part of the said parts and shares, hereditaments and premises, hereby released, or otherwise assured or intended so to be, either by themselves solely and alone, or jointly and together, with any other lands, tenements, or hereditaments, parts or shares, by or between all and every, or any or either, of the persons who are parties to these presents, or to which they, or any, or either of them is, or are, or shall, or may be parties or privies, or a party or privy shall, as to all the said parties to these presents respectively, as far as they respectively can lawfully or rightfully direct the

parties will give effect to the same.

DECLARATION that the recoveries,

the lease for a year, and the present deed, and all other fines, &c.

uses of the same fine or fines, common recovery or recoveries, and other assurances, be and enure, and be adjudged, expounded, deemed, decreed, and taken to be and enure, and that the same was and were meant and intended, and is and are hereby directed and declared to be and enure; and also that the person or persons to whom such fine or fines, common recovery or recoveries, and other assurances respectively, have or hath been, or shall or may be, levied, suffered, made, and executed, shall stand and be seised, *as to*, for, and concerning the said several parts and shares hereby released, or otherwise assured or intended so to be, of and in the said moiety of the said New River water-cut and stream, profits, and hereditaments, called the King's moiety, and every part and parcel of the same, with the appurtenances; *To the uses*, upon the trusts, and for the ends, intents, and purposes hereinafter limited, expressed, and declared, of and concerning the same, (that is to say) *To the use* of the said J. W. and J. F. their heirs and assigns, during the life of the said E. W, *upon the trusts* hereinafter declared of their estate. *And* from and after the determination of that estate by any means, *To the use* of the said E. G. his heirs and assigns, during the natural life of the said E. W, *Upon trust* to support and preserve the contingent interests limited to the children of the said E. W, by the will of her said father. *And* from and after the decease of the said E. W, *To the use* of the said J. W. and J. F. their heirs and assigns for ever, upon the trusts hereinafter declared of their estate. *And* it is hereby directed, declared, and agreed by and between

shall enure,

and that persons shall stand seised.

As to the shares conveyed.

To the use of the trustees J. W. and J. F. for life of the daughter.

Remainder, To the use of another trustee for life of the daughter, in trust to support the contingent interests under the will.

Remainder, To the use of the trustees J. W. and J. F. in fee.

the parties to these presents, as far as they respectively are interested, that the several limitations hereinbefore made to the use of the said J. W. and J. F, their heirs and assigns, for the life of the said E. W, and in fee, are made to them *Upon trust* and to the intent and purpose that they the said J. W. and J. F. their heirs, executors, and administrators, and every of them, shall and may, by, with, and out of the profits of the said several parts and shares, or otherwise by a mortgage or mortgages, sale or sales, of the same parts and shares, or a competent part of the same parts and shares, be well and sufficiently reimbursed and satisfied, and also indemnified and saved harmless, of, from, and against all damages, losses, costs, charges, expences, suits, claims, and demands, which at any time or times, and from time to time, hereafter, shall or may be incurred, or sustained by, or made upon, or brought or instituted against, the said J. W. and J. F. or either of them, their, or either of their heirs, executors, or administrators, for or on account of their having joined, (as trustees under the said in part recited will of the said J. W.) in the conveyance or assurance made or intended to be made by these presents. *And* from and after full reimbursement and satisfaction of and for all such damages, losses, costs, charges, expences, suits, claims, and demands, and in the mean time subject thereto; *As to*, for, and concerning one moiety, half part, or share, of two six-and-thirtieth parts or shares, (making together one full six-and-thirtieth part or share,) of and in the said moiety called the King's moiety of the said New River water-cut and stream, and the

Declaration that the estates are limited to the use of J. W. and J. F. the trustees. to indemnify them for having joined in the conveyance.

And subject thereto,

As to a moiety of two 36th parts (making one full 36th part)

profits thereof, and other hereditaments, with the appurtenances (being the part or share which was purchased by the said J. W. of and from the said E. Lady Viscountess B,) *Upon trust* that they the said J. W. and J. F, and the survivor of them, or his heirs, do and shall from time to time, during the natural life of the said E. W. retain and take the rents, income, and profits arising from the same parts or shares, and hereditaments; and stand and be possessed thereof, for the sole use of the said E. W, separate and apart from, and exclusive of any husband with whom she may from time to time intermarry, and so, and in such manner, that the same may not be under the controul, or subject or liable to the debts, contracts, forfeiture, or engagements of any such husband; and in such manner that the receipt of her the said E. W, or any person or persons to whom she may appoint the same rents, income, and profits when due, may be good and effectual discharges for the money which shall be thereby expressed to be received; yet nevertheless so that the said E. W. may not at any time hereafter anticipate, charge, or assign all or any part of the same rents, income, and profits, before the same shall become due and payable. *And* from and after the decease of the said E. W, then *Upon trust* for the child, if only one, or if more than one, for the several children of the said E. W, who are or shall become intitled to the same parts, shares, and hereditaments, under or by virtue of the said in part recited will of the said J. W, and for such estates and in such shares and proportions as such child or children can claim to be intitled to have, in the same parts,

Upon trust for the separate and personal use of the daughter for her life.

Remainder, In trust for her children as entitled under the will.

shares, and hereditaments under or by virtue of the same will. *And* from and after the determination of the estates and interests of the same children respectively, then *In trust* for the child, if only one, and if more then one, then all the children of the said E. W, lawfully to be begotten, to be equally divided between or among the same children, if more than one, share and share alike, as tenants in common, and not as joint-tenants, and the heirs and assigns of the same child or children respectively, in fee, and not in tail. *And* in case any one or more of such children should depart this life under the age of twenty-one years without leaving any issue of his, her, or their body or bodies lawfully begotten, living at his, her, or their death or respective deaths, *then* as, to, for, and concerning the original part or share of and in the parts or shares and hereditaments hereinbefore limited for the benefit of the said children; and also the part or share, or parts or shares thereof, which from time to time shall belong to, or vest in, or be taken by, the same child or children respectively, by virtue of this present provision, in the nature of cross remainders, *Upon trust* for the other or others of the same children, to be equally divided between or among them, if more than one, share and share alike, as tenants in common, and not as joint-tenants, and his, her, and their heirs and assigns for ever. *And* in case there shall not be any child of the said E. W, or if all such children, if any, shall depart this life under the age of twenty-one years, and neither of them shall leave any issue of his or her body lawfully begotten, living at his or her death, then *Upon trust* for the

Remainder.

In trust for the children as tenants in common in fee.

And if any of them die under age, without issue at their deaths, with cross limitations between them in fee.

And if no children, or all die under age without leaving issue at their deaths,

In trust for

J. W. in fee. As to the remaining shares, said J. W. his heirs and assigns for ever. *And as to*, for, and concerning the remaining parts and shares hereby released, or otherwise assured or intended so to be, of and in the said moiety called the King's Moiety of the said New River water-cut or stream, and the profits thereof, and other

In trust for J. W. in fee. hereditaments, with the appurtenances, *In trust* for the said J. W. his heirs and assigns for ever. And to, for, or upon no other use, trust, intent, or

Proviso that the trusts are declared for the children purpose whatsoever. *Provided always*, and it is hereby declared and agreed by and between the parties to these presents, as far as they respectively are interested, that the trusts hereinbefore declared in favor of each and every of the children of the said E. W, (other than and except the trusts declared for his or her benefit for the purpose of restoring to him or her the estate or interest to which the same child respectively

upon the terms of their confirming the trust declared for J. W. may be entitled under the will of the said J. W,) are so declared, upon the terms that the same child shall confirm and give effect to the trust, secondly hereinbefore declared for the benefit of the said J. W, his heirs and assigns, and that the same child shall upon the request and at the cost and charges of the said J. W. his heirs or assigns, do all such acts, and make and execute all such assurances as shall be necessary or deemed advisable for the purpose of conveying and assuring to the said J. W. his heirs and assigns, the parts, shares, and hereditaments, secondly hereinbefore limited, in trust for the

and that on default, the shares of the children re- said J. W. his heirs and assigns. And further, that on default by each, any, or either of the same children to make such confirmation, or to

do such acts, or make or execute such assurances, the part or share, including the surviving, as well as the original share of each child, by whom such default shall be made, shall be held, in trust for the said J. W. his heirs and assigns. AND THIS INDENTURE ALSO WITNESSETH, that, for the considerations hereinbefore expressed, and by way of further assurance; and so as to convey the inheritance of and in the said shares and hereditaments, and every of them, to the uses hereinafter limited of the same shares and hereditaments; and also in consideration of ten shillings of like lawful money, to each of them, the said E. W. and J. W, well and truly paid by the said J. G, immediately before the execution of these presents, (the receipt whereof is hereby acknowledged,) The said E. W. and J. W, (subject, nevertheless, and without prejudice to the grant hereinbefore contained,) *have*, and each of them *hath* granted, bargained, sold, and aliened, and by these presents *do*, and each of them *doth* grant, bargain, sell, and alien, unto the said J. G. his heirs and assigns, ALL those the parts, or shares of them, and each or either of them the said E. W. and J. W, of and in the said moiety, of the said New River water-cut or stream, and other hereditaments hereinbefore mentioned, or described, and all other the hereditaments hereinbefore described and mentioned, and intended to be hereby released to the said J. H. and his heirs, during the life of the said E. W, and every part and parcel of the same, with the appurtenances. *And* the reversion and reversions, remainder and remainders, yearly and other rents

fusing shall be in trust for J. W. in fee.

INDENTURE FURTHER WITNESSETH that for conveying the inheritance to uses after declared, and for nominal consideration,

The daughter and son (subject to the former grant)

Grant to J. G.

Their shares in the said moiety of the New River.

Reversion, &c.

and profits, of the said hereby, or hereby intended to be, granted, or otherwise assured parts or shares, and hereditaments, and every part and parcel of the same, with their and every of their rights, members, and appurtenances. To HAVE AND TO HOLD the said parts, shares, hereditaments, and all and singular other the premises hereby granted, or otherwise assured, or intended so to be, and every part and parcel of the same with their and every of their rights, members, and appurtenances, unto the said J. G. his heirs and assigns, *To the uses*, upon the trusts, and for the ends, intents, and purposes hereinafter limited, expressed, and declared, or referred to, (that is to say) in the first place, *To the use* of the said E. G. his heirs and assigns, during the life of the said E. W. so as to give effect to and confirm the estate hereinbefore limited to the use of the said E. G. his heirs and assigns, during the life of the said E. W, nevertheless upon, under, and subject to the trusts hereinbefore declared of that estate. *And* from and after the determination of that estate, and in the mean time subject thereto ; *To the use* of the said J. W. and J. F. their heirs and assigns for ever, upon the trusts, and for the ends, intents, and purposes hereinbefore expressed and declared of and concerning the estate in fee hereinbefore limited to their use, and for more effectually confirming and giving effect to that estate, and the trusts, ends, intents, and purposes hereinbefore limited and declared thereof. *And* each of them the said J. W. and E. W. severally, separate, and apart from the other of them, doth by these presents,

HABENDUM to the grantee in fee.

To the use of E. G. for life of the daughter, to confirm the estate before limited to him.

Remainder.

To the use of the trustees J. W. and J. F, upon the trusts before declared.

SEVERAL COVENANT by two persons

for himself and herself respectively, and his and her respective heirs, executors, and administrators; and as to, and concerning only his and her own acts, deeds, and defaults, covenant, promise, and agree to and with the said J. H. his heirs and assigns, that they, the said J. W. and E. W, respectively, shall and will, from time to time, and at all times hereafter, upon every reasonable request of the person or persons intitled by virtue of these presents to any estate or interest in the parts, or shares, and hereditaments hereby released, or otherwise assured, or intended so to be, or any or either of them, and at the costs and charges of the person or persons by whom such request shall be made, make, do, acknowledge, levy, suffer, execute, and perfect, or cause or procure to be made, done, acknowledged, levied, suffered, executed, and perfected, all such further and other lawful and reasonable acts, deeds, devices, conveyances, and assurances, in the law whatsoever, either by fine or fines, with or without proclamations, common recovery or recoveries, deed or deeds, inrolled or not inrolled, release, confirmation, or other assurance whatsoever, for further, better, more perfectly, lawfully, and absolutely, or satisfactorily granting, releasing, confirming, or otherwise assuring the said parts, shares, and hereditaments hereby released, or otherwise assured, or intended so to be, and every part and parcel of the same, with the appurtenances, to the uses, upon the trusts, and for the ends, intents, and purposes hereinbefore limited, expressed, and declared of and concerning the same, according to the true intent and meaning of these presents, as by the person or per- for further assurance.

sons so intitled, and making such request, or his, her, or their counsel in the law, shall be reasonably devised, or advised, and required, and tendered to be made, done, and executed, *In witness*, &c.

FORM VII.

Release in Fee of three undivided sixth Parts, being a Moiety of a Messuage Farm, &c. in T. and S. in the Parish of S. &c. in the County of V. that a common Recovery may be suffered thereof, to bar the Estates-tail, if any, and to extinguish the Title of Dower, of the Wife of one of the Owners: with a Declaration, as to one sixth Part, of Uses, to prevent a new Title of Dower; and as to the two remaining sixth Parts, of Uses in Favor of the Owners in Fee.

PARTIES. THIS INDENTURE of five parts made the day of 1805. BETWEEN T. B. of, &c. gentleman, and E. his wife, of the first part; B. C. of, &c. gentleman of the second part; M. S. of, &c. spinster, of the third part; C. R. of, &c. Esq., of the fourth part; and W. B. of, &c. gentleman, of the fifth part. WHEREAS the said T. B. is the only son and heir at law, and heir in tail, of J. B. one of the daughters of M. S, late of, &c. gentleman, deceased, and a devisee named in his will hereinafter mentioned. AND WHEREAS the said B. C. is the grandson, heir at law, and heir in tail of M. C, one other of the daughters of the said M. S, and a devisee named in his said will. AND WHEREAS the said M. S. is the grandaughter, heir at law, and heir in tail of T. S, one of the sons of the said M. S, and a devisee named in his said will. And as such, (J. S. the eldest son, and heir

Recites the titles of three persons by several descents,

and their seisin in tail,

at law, and a devisee in tail, named in the will of the said M. S, having died without issue,) the said T. B, B. C. and M. S. are seised in fee-simple or fee-tail, of three sixth parts, of and in the messuages, lands, and hereditaments hereinafter described, and hereby released, or otherwise assured, or intended so to be, with their and every of their rights, members, and appurtenances, under or by virtue of the last will and testament of the said M. S, bearing date on or about the 8th day of October, in the year 1748, and after his death, and on or about the 12th day of February, 1758, proved in the court of

(under a will) in three sixth parts of the messuages, &c.

AND WHEREAS the said T. B, B. C. and M. S. are desirous, and have determined to suffer a common recovery of their respective shares of and in the said messuages, lands, and hereditaments, and to limit the same shares to the uses hereinafter declared of and concerning the same respectively. AND WHEREAS the said E. B. hath agreed to join in the common recovery, hereinafter agreed to be suffered, for the purpose of barring and extinguishing her dower, right, or title of dower, in the said share of her said husband of the same hereditaments. NOW THIS INDENTURE WITNESSETH, that, for docking, barring, and destroying all estates and interests in tail of and in the said several and respective three sixth parts of and in the messuages, lands, and hereditaments hereinafter mentioned, and all reversions and remainders expectant or depending on the same estates or interests in tail, and all conditions and collateral limitations annexed thereto: and for settling and assuring the same parts or shares of and in the said messuages, lands, and

Desire to suffer a recovery.

Agreement of wife to join for extinguishing her dower.

Witnesseth that for barring estates-tail, &c.

and for settling the shares to uses,

hereditaments to the uses and for the ends, intents, and purposes hereinafter expressed and declared concerning the same; and in consideration of ten shillings of lawful money of the united kingdom of Great Britain and Ireland, current in Great Britain, to each of them, the said T. B, B. C. and M. S, well and truly paid by the said W. B, immediately before the execution of these presents, (the receipt whereof is hereby acknowledged,) The said T. B, B. C. and M. S, according to their respective shares and interests, *have*, and each and every of them *hath* granted, bargained, sold, aliened, released, and confirmed, and by these presents *do*, and each and every of them *doth* grant, bargain, sell, alien, release, and confirm unto the said W. B, his heirs and assigns, (in the actual possession of the said W. B, now being, in virtue of a bargain and sale thereof made to him by the said T. B, B. C. and M. S. in consideration of five shillings paid to each to them by the said W. B. by indenture bearing date on the day next before the day of the date, and executed before the execution of these presents, for one whole year, to be computed from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession,) ALL those three undivided sixth parts, or shares of them, the said T. B, B. C. and M. S, respectively, (the whole into six equal parts to be divided,) and being equal to one moiety, or half part, of and in, *All that* messuage or tenement, farm, and those several cottages, closes, pieces, or parcels of land, intacks and hereditaments, situate, lying, and being at or in S, in the

and for nominal considerations,

The three tenants in tail, grant, &c. to W. B. in fee.

(reference to lease for a year)

Three sixth shares (being equal to one moiety) of

A farm.

parish of S, in the said county of Y, and the township or hamlet of T, in the said county of Y, and containing by estimation 159 acres, or thereabouts, be the same more or less, which were late the inheritance of the said M. S. deceased, and are now or were lately in the several tenures or occupations of

And also of and in all and all manner of tithes, tenths, oblations, obventions, and other dues, great and small, arising, coming, increasing, and renewing, upon, from, and out of the hereditaments hereinbefore described, or any of them. The tithes thereof.

And also of and in all those several closes, pieces, and parcels of land, and hereditaments situate, lying, and being in the township of T, near R, in the said county of Y, now or formerly called by the several names of and a garden adjoining to Great P, or the scite of the same garden, and containing together by estimation, including the broken ground adjoining to the cliff, twenty-one acres and two roods, or thereabouts. Closes of land.

Which said messuage, lands, and hereditaments first hereinbefore described, are the same messuage, lands, and hereditaments, which by a different description were conveyed and assured to and to the use of the said M. S. his heirs and assigns, by certain indentures of lease and release, bearing date respectively on or about the ninth and tenth days of April, in the year 1732, and made, or expressed to be made, between J. H. of, &c. mariner, of the one part, and the said M. S. then of, &c. gentleman, of the other part. Reference to title.

And which said last mentioned closes, pieces, and parcels of land and hereditaments are the same hereditaments which

were conveyed and assured to and to the use of the said M. S. his heirs and assigns for ever, by certain indentures of lease and release, bearing date respectively on or about the tenth and eleventh days of March, in the year 1707, and made, or expressed to be made, between T. W. of, &c. gentleman, of the one part, and the said M. S. therein described as M. S. of, &c. mariner, of the other part. *And also* of and in all houses, cottages, outhouses, edifices, buildings, barns, stables, yards, gardens, orchards, closes of land, meadow, and pasture, feedings, woods, underwoods, and the ground and soil thereof, commons, and common of pasture, and of turbary, and other commonable rights, tithes, tenths, wrecks of the sea, scar-dues, land covered with water, cliffs, hedges, ditches, fences, mounds, ways, paths, waters, water-courses, liberties, privileges, easements, profits, commodities, advantages, and emoluments whatsoever to the said messuages, or tenements, lands, and hereditaments, hereinbefore described, or any of them respectively, belonging, or in any wise appertaining, or accepted, reputed, deemed, taken, known, held, occupied, or enjoyed, as part, parcel or member of the same, or any of them respectively. *And* of and in all other the freehold messuages or tenements, lands, tithes, and hereditaments situate, lying, and being, or arising in T. S, or the parish of S, or any of them, in the said county of Y, which were devised by the said M. S. in and by his last will and testament, bearing date on or about the 8th October, 1748, to his the said testator's two sons, J. S, T. S, and to his four daughters therein named, and

General words for farms.

Sweeping clause.

grandson M. S, as therein mentioned, as tenants in tail. *Excepting*, and always reserving, out of the grant or release hereby made, so much and such parts of the said fields or closes of land now or formerly called Lanefield, as have been taken out of the same fields, or closes of land, for making a road to R, and have been sold for that purpose. Exception of land taken for a road.

And the reversion and reversions, remainder and remainders, yearly and other rents and profits of the said hereby, or hereby intended to be released parts or shares of the said messuages, lands, and hereditaments, and every part and parcel of the same, with their and every of their rights, members, and appurtenances, except as aforesaid. Reversion, &c.

And all the estate, right, title, interest, use, trust, inheritance, term and terms for life or lives, property, possession, benefit, and equity of redemption, claim, and demand whatsoever, at law and in equity, or otherwise howsoever of them, the said T. B, B. C. and M. S, respectively, of, in, to, and out of the same parts, or shares of the same messuages, lands, and hereditaments, and every part and parcel of the same, with their and every of their rights, members, and appurtenances, except as aforesaid. All the estate, &c.

To HAVE AND TO HOLD the said hereby or hereby intended to be released or otherwise assured parts or shares of and in the said messuages, lands, and hereditaments, and also all and singular other the premises hereby released, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances, (except as aforesaid,) unto the said W. B. his heirs and assigns. HABENDUM to W. B. in fee.

To the use of the said W. B.

To make him tenant to the *præcipe* for suffering a common recovery.

his heirs and assigns. To THE INTENT that the said W. B. may be tenant of the freehold, of all and singular the said hereby, or hereby intended to be released or otherwise assured parts or shares of and in the said messuages, lands, and hereditaments, and every part and parcel of the same, with their rights, members, and appurtenances; *to the end* that one or more good and perfect common recovery or recoveries, with double voucher, may be had and suffered of the same parts, shares, and hereditaments. *And* for that purpose it is hereby directed, declared, and agreed by and between all the said parties to these presents, as far as they respectively are interested, that the said W. B. shall permit and suffer the said C. R, or some other person or persons, at the costs and charges in all things of the said T. B, B. C, and M. S, their heirs, executors, or administrators, at any time or times hereafter, to sue forth and prosecute against him the said W. B, out of his majesty's high court of Chancery one or more writ or writs of entry *sur disseisin en le post*, returnable before his majesty's justices of the court of Common Pleas at Westminster; and thereby demand of the said W. B, the said hereby or hereby intended to be released or otherwise assured parts or shares of and in the said messuages, lands, and hereditaments, with their and every of their rights, members, and appurtenances by the names and description of one moiety of four messuages, four gardens, 180 acres of land, 50 acres of meadow, 50 acres of pasture, 12 acres of wood, 12 acres of underwood, 50 acres of moor, 50 acres of furze and heath, and common

Mode of suffering the recovery prescribed.

of pasture, for all manner of cattle, common of turbary, aud wreck of the sea, with the appurtenances, in T. S, and in the parish of S, and of and in all and all manner of tithes and tenths whatsoever, yearly arising, increasing, and renewing out of, upon, and from the said tenements in S. aforesaid, or by such other apt, good, sufficient, and proper names, number of messuages and acres, quantities, qualities, and other descriptions as shall be deemed necessary, proper, sufficient, and requisite to comprise the same. And that the said W. B. shall in his own person, or by his attorney or attornies lawfully authorised in that behalf, appear to the same writ or writs, and vouch to warranty the said T. B. and E. his wife, B. C. and M. S. And that the said T. B. and E. his wife, B. C. and M. S, shall in their own persons or by their attorney or attornies lawfully authorised in that behalf, appear gratis, and freely enter into the warranty of the said W. B.; and taking the same upon themselves respectively, vouch over to warranty the common vouchee of the said court of Common Pleas for the time being; who shall appear gratis, and freely enter into the warranty of the said T. B. and E. his wife, B. C. and M. S, and after imparlance make default. So that judgment may be given upon the said writ or writs, and every of them, for the said C. R, or other demandant or demandants, to recover all and singular the said parts or shares of the said messuages, lands, and hereditaments, and every part and parcel of the same parts or shares, with their and every of their rights, members, and appurtenances, by such names, quanti-

ties, qualities, and other descriptions as aforesaid, against the said W. B.; and for the said W. B. to recover in value against the said T. B. and E. his wife, B. C. and M. S.; and for the said T. B. and E. his wife, B. C. and M. S, to recover in value against the common vouchee, as is usual in such cases. And that upon all and every recovery and recoveries to be suffered as aforesaid execution may be sued and prosecuted by, and seisin had, taken, and delivered unto the said C. R, or other demandant or demandants, accordingly. And that every other act or thing needful, requisite, or proper to be done or executed for the purpose of suffering and perfecting a common recovery or recoveries of those parts or shares of the said messuages or tenements, lands, and hereditaments, which are hereby released, or otherwise assured or intended so to be, with double, treble, or other voucher, to dock the estates-tail of the said T. B, B. C. and M. S, of and in the same parts or shares, and all reversions and remainders over and expectant upon the same estates-tail, and to extinguish the dower, right, and title of dower of the said E. B, may be made, done, and executed. And by way of direction and declaration, and not of covenant, it is hereby granted, declared, and agreed, by and between the parties to these presents, as far as they respectively are interested, and they hereby for themselves severally and respectively, and for their several and respective heirs, executors, and administrators, according to their respective estates, rights, and interests in the premises, consent and agree, that the recovery hereby agreed

to bar the estates-tail, &c.

and extinguish dower.

DIRECTION that recovery shall be suffered.

to be suffered, shall be suffered and perfected, with all possible dispatch; and that they respectively, and their respective heirs, on their respective parts, will use their utmost endeavours to give effect to the same recovery and also to these presents, and the grant, release, confirmation or other assurance hereby made. AND IT IS HEREBY FURTHER DIRECTED, declared, and agreed, by and between all the parties to these presents as far as they respectively have any right, title or interest in the premises, that immediately upon and after judgment obtained, and seisin had and taken upon such recovery or recoveries as aforesaid, the recovery or recoveries so as aforesaid, or in any other manner, or at any other time or times to be suffered; and also the bargain and sale for a year, bearing date on the day next before the day of the date of these presents; and also these presents, and the assurance hereby made; and all and every other fine and fines, recovery and recoveries, and other assurances whatsoever, at any time or times heretofore, and to be any time, and from time to time hereafter had, made, done, levied, suffered, executed, and perfected, of or concerning all or any part of those parts or shares of the said messuages, lands, and hereditaments which are hereby released, or otherwise assured, or intended so to be, either by themselves solely and alone, or jointly and together with any other part of the same messuages, lands, and hereditaments, or jointly and together with any other lands, tenements, or hereditaments, by or between all and every, or any or either of the persons who are parties to these presents, or to

and that parties will give effect to the same.

Declaration that the recovery,

and the lease for a year, and the present deed,

and all other fines, &c.

which they, or any or either of them, is or are, or shall or may be parties or privies, or a party or privy, shall, as to all the said parties to these presents respectively, as far as they respectively can lawfully or rightfully direct the uses of the same fine and fines, common recovery and recoveries, and other assurances, be and enure, and be adjudged, expounded, deemed, decreed, and taken to be and enure, and that the same was and were meant and intended, and is and are hereby directed and declared to be and enure; and also that the person and persons to whom the said fine or fines, common recovery or recoveries, and other assurances respectively, have or hath been, or shall or may be levied, suffered, made, and executed, shall stand and be seised, *As to*, for, and concerning one of the said three undivided sixth parts, (being the part or share of the said T. B,) of and in the said messuages, lands, and hereditaments, with the rights, members, and appurtenances, *To the use* of such person or persons, for such estate or estates, and for such interest or interests, by way of annuity, rent-charge, or otherwise, and in such parts, and proportions, and upon such trusts, and for such ends, intents, and purposes, and charged and chargeable in such manner, and either absolutely or conditionally, and subject to such powers of revocation and of new appointment, and other powers, provisoes, conditions, restrictions, limitations, declarations and agreements, as the said T. B. at any time or times, and from time to time, by any deed or deeds, instrument or instruments in writing, to be sealed and delivered by him in the presence of two or more credible

shall enure,

and persons shall stand seised.

As to one sixth part (being the share of T. B.)

To the use of such persons, &c. as T. B. shall by deed appoint.

witnesses, and attested by the same witnesses, shall direct, limit, or appoint. *And* in default of such direction, limitation, and appointment, and in the mean time and from time to time until the same shall take effect, and from time to time subject to such uses, estates, trusts, charges, and interests as shall have been directed, limited, or appointed by the said T. B.; then *To the use* of the said T. B. and his assigns for and during the term of his natural life. *And* from and after the determination of that estate by any means, then *To the use* of the said C. R. his heirs and assigns, during the natural life of the said T. B.: *Upon trust* for, and for the sole benefit of, the said T. B. and his assigns; and to the intent that the present or any future wife of the said T. B. may not be entitled to dower. *And* from and after the determination of the estate hereby limited to the use of the said C. R. his heirs and assigns, for the life of the said T. B.; then *To the use* of the said T. B. his heirs and assigns for ever. *And as to*, for, and concerning one other of the said three undivided sixth parts, (being the undivided part or share of the said B. C,) of and in the same messuages, lands, and hereditaments, with the rights, members, and appurtenances, *To the use* of the said B. C. his heirs and assigns for ever. *And as to*, for, and concerning the other of the said three undivided sixth parts, (being the undivided part or share of the said M. S,) of and in the same messuages, lands and hereditaments, with the rights, members, and appurtenances, *To the use* of the said M. S. her heirs and assigns for ever. *In witness*, &c.

for default of appointment.

To the use of T. B. for life.

Remainder,

To the use of C. R. for life of T. B.

In trust for T. B. and to prevent dower.

Remainder.

To the use of T. B. in fee,

As to another sixth part (being the share of B. C.)

To the use of B. C. in fee.

As to the remaining sixth part (being the share of M. S.)

To the use of M. S. in fee.

FORM VIII.

Mode of introducing the Limitation of Uses declared of a Recovery, suffered by some only of several Tenants in Common in tail, with Cross Remainders; so as to preserve the Identity of Title.

A. tenant for life, remainder to her seven children in tail, with cross remainders between them in tail. A. conveyed her interest in the intirety, and five of the seven children their respective shares, to the tenant to the præcipe. The limitation of the use of each share was introduced by the following words:

As to, for, and concerning one undivided seventh part or share, of and in the said messuage, &c. hereby released, &c. (being the one seventh part of which the said K. L. is the first tenant in tail,) And as to, for, and concerning one undivided fifth part or share, of those two seventh parts or shares of the same messuage, &c. of which the said R. L. and E L. (*a*) are the first tenants in tail, (which shares make together one full fifth part of the intirety) *To the use*, &c.

(*a*) These were the two children who were not parties to the recovery and conveyance.

FORM IX.

Bargain and Sale of divers Manors, &c. in the County of K. for the joint Lives of the Tenant in Tail and Bargainee, that a Common Recovery may be suffered thereof to the Use of the Tenant in Tail, in Fee.

*** *This may be considered as one of the most simple forms, and adapted to all cases not attended with special circumstances.*

The alteration from a bargain and sale to a release grounded on a lease for a year, may be easily made.

THIS INDENTURE of three parts made the 27th day of November, 46th George III. A. D. 1805. BETWEEN G. P. of, &c. Esq. of the first part; J. W. of, &c. gentleman, of the second part; and T. R. S. of the same place, gentleman, of the third part. WHEREAS the said G. P. is, under and by virtue of the last will and testament of C. P. Esq. deceased, his late father, bearing date on or about the 23d day of June, 1789, and certain codicils thereto annexed, all proved in the Prerogative Court of the Archbishop of Canterbury on or about the day of instant, or some or one of them, seised of an estate-tail in possession of the manors, messuages, farms, lands, tenements, and hereditaments hereinafter bargained and sold, or otherwise assured, or intended so to be, with their rights, royalties, members, and ap-

PARTIES.

Recital that G. P. is, under a will, tenant in tail in possession.

Witnesseth that for barring estates-tail, &c.

purtenances. Now this indenture witnesseth that for docking, barring, and destroying all estates-tail of and in the manors, messuages, farms, lands, tenements and hereditaments hereinafter bargained and sold, or otherwise assured, or intended so to be, and all reversions or remainders expectant or depending on the same

and for settling the manors on the owner in fee, and for nominal consideration,

estates-tail; and for settling and assuring the same manors, messuages, farms, lands, tenements, and hereditaments, to the use of the said G. P. his heirs and assigns for ever; and in consideration of ten shillings, of lawful money of the united kingdom of Great Britain and Ireland, current in Great Britain, to the said G. P. well and truly paid by the said J. W, immediately before the execution of these presents, (the receipt whereof

Tenant in tail grants to J. W.

is hereby acknowledged,) He the said G. P. *hath* granted, bargained, and sold, and by these presents *doth* grant, bargain, and sell, unto the said J. W. All and singular the manors, messuages,

All the manors, &c. in several parishes whereof he is seised in tail.

farms, lands, tenements, and hereditaments, situate, lying, and being in the towns, places, or parishes of C. C. D. O. S. W. S. A. K. K. H. C. K. E. otherwise E. S. F. and R, in the said county of K, or any of them, of which the said G. P. is, or at any time heretofore hath been, tenant for an estate-tail, either at law, or in equity, under or by virtue or means of the last will and testament of the said C. P. his deceased father, or any codicil or codicils thereto, or under or by virtue or means of any other will, deed, or settlement whatsoever, and every part and parcel of the

General words for manors.

same. *And* all and singular messuages, farms, cottages, houses, outhouses, edifices, buildings,

stables, barns, coach-houses, dove-cotes, yards, gardens, orchards, backsides, tofts, crofts, lands, meadows, pastures, heaths, moors, marshes, wastes, waste-grounds, folds, fold-courses, and liberty of foldage, feedings, parks, warrens, commons, common of pasture, common of turbary, mines, minerals, quarries, mills, mulctures, fairs, markets, customs, tolls, duties, furzes, trees, woods, underwoods, and the ground and soil thereof, mounds, fences, hedges, ditches, free-boards, ways, waters, water-courses, lands covered with water, fishings, fisheries, fowlings, courts leet, courts baron, and other courts, perquisites and profits of courts, view of frank-pledge, and all that to view of frank-pledge doth belong, reliefs, heriots, fines, sums of money, amerciaments, goods and chattels of felons and of fugitives, and of felons of themselves, and of outlawed persons, deodands, waifs, estrays, chief-rents, quit-rents, rent-charges, rents seek, rents of assize, fee farm rents, boons, services, royalties, jurisdictions, franchises, liberties, privileges, easements, profits, commodities, emoluments, hereditaments and appurtenances whatsoever to the said manors, messuages, farms, lands, tenements, and hereditaments respectively, hereby bargained and sold, or otherwise assured, or intended so to be, or any of them respectively, belonging, or in any wise appertaining, or with the same or any of them respectively, now demised, leased, held, used, occupied, or enjoyed, or accepted, reputed, deemed, taken, or known as part, parcel, or member of them or any of them, or appurtenant thereunto, with their and every of their appur-

Reversion, &c.

tenances. *And* the reversion and reversions, remainder and remainders, yearly and other rents and profits of the said manors, messuages, farms, lands, tenements and hereditaments, hereby bargained and sold, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their rights, royalties, members, and appurtenances. To HAVE AND TO HOLD the said manors, messuages, farms, lands, tenements, hereditaments, and all and singular other the premises hereby bargained and sold, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their rights, royalties, members, and appurtenances, unto and to the use of the said J. W. and his assigns, for and during the joint natural lives of the said G. P. and J. W. To THE INTENT that the said J. W. may be tenant of the freehold of all and singular the said manors, messuages, farms, lands, tenements, and hereditaments, hereby bargained and sold, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their rights, royalties, members, and appurtenances, *to the end* that one or more good and perfect common recovery or recoveries with double voucher may be had and suffered of the same hereditaments. *And for that purpose* it is hereby directed, declared, and agreed, by and between all the said parties to these presents, as far as they respectively are interested, that the said J. W. shall permit and suffer the said T. R. S. or some other person or persons, at the costs and charges in all things of the said G. P. his heirs, executors,

HABENDUM to the grantee for the joint lives of himself and tenant in tail.

To make him tenant to the *præcipe*,

for suffering a common recovery.

Mode of suffering the recovery prescribed.

or administrators, at any time or times hereafter to sue forth and prosecute against him the said J. W, out of his majesty's high court of Chancery, one or more writ or writs of entry, *sur disseisin en le post*, returnable before his majesty's justices of the court of Common Pleas, at Westminster ; and thereby demand of the said J. W. the manors, messuages, farms, lands, tenements, hereditaments, and premises hereby bargained and sold, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their rights, royalties, members, and appurtenances, by such apt, good, sufficient, and proper names, number of messuages and acres, quantities, qualities, and other descriptions as shall be deemed necessary, proper, sufficient, and requisite to comprise the same. And that the said J. W, shall in his own person, or by his attorney or attornies lawfully authorised in that behalf, appear to the same writ or writs, and vouch to warranty the said G. P. And the said G. P. shall in his own person, or by his attorney or attornies lawfully authorised in that behalf, appear gratis, and freely enter into the warranty of the said J. W. ; and taking the same upon himself, vouch over to warranty the common vouchee of the said court of Common Pleas for the time being : who shall appear gratis, and freely enter into the warranty of the said G. P. ; and after imparlance make default. So that judgment may be given upon the said writ or writs and every of them for the said T. R. S, or other demandant or demandants, to recover all and singular the said manors, messuages, farms, lands, tenements, and

hereditaments, hereby bargained and sold, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their rights, royalties, members, and appurtenances by such names, quantities, qualities, and other descriptions as aforesaid, against the said J. W.; and for the said J. W. to recover in value against the said G. P.; and for the said G. P. to recover in value against the common vouchee, as is usual in such cases. And that upon all and every recovery and recoveries to be suffered as aforesaid, execution may be sued and prosecuted by, and seisin had, taken, and delivered unto the said T. R. S, or other demandant or demandants accordingly. And that every other act or thing needful, requisite, or proper to be done or executed for the purpose of suffering and perfecting a common recovery or recoveries of the manors, messuages, farms, lands, tenements, and hereditaments hereby bargained and sold, or otherwise assured, or intended so to be, with double, treble, or other voucher, to bar the estates-tail now or late of the said G. P, of and in the same manors, messuages, farms, lands, tenements, and hereditaments, and all reversions and remainders over and expectant upon the same estates-tail, may be made, done, and executed. *And* by way of direction and declaration, and not of covenant, it is hereby granted, declared, and agreed, by and between the said parties to these presents, as far as they respectively are interested, and they hereby for themselves, severally and respectively, and for their several and respective heirs, executors, and administrators, consent and agree, according to

to bar the estates-tail, &c.

Direction that the recovery shall be suffered.

their respective estates, rights, and interests in the premises, that the recovery hereby agreed to be suffered shall be suffered and perfected with all possible dispatch; and that they respectively, and their respective heirs, will, on their respective parts, use their utmost endeavours to give effect to the same recovery, and also to these presents, and the grant, bargain, and sale, or other assurance hereby made. AND IT IS HEREBY FURTHER DIRECTED, declared, and agreed, by and between all the said parties to these presents, as far as they respectively have any right, title, or interest in the premises, that immediately upon and after judgment obtained, and seisin had and taken upon such recovery or recoveries as aforesaid, the recovery or recoveries so as aforesaid, or in any other manner, or at any other time or times to be suffered; and also these presents, and the assurance hereby made; and all and every other fine and fines, recovery and recoveries, and other assurances whatsoever, at any time or times heretofore, and to be at any time, and from time to time hereafter had, made, done, levied, suffered, executed, and perfected, of or concerning all or any part of the said manors, messuages, farms, lands, tenements, and hereditaments hereby bargained and sold, or otherwise assured, or intended so to be, either by themselves solely and alone, or jointly and together with any other lands, tenements, and hereditaments, by or between all and every, or any or either of the persons who are parties to these presents, or to which they or any or either of them is or are, or shall or may be parties or privies, or a party or privy, shall, as to

and that parties will give effect to the same

Declaration that the recovery,

and the present deed, and all other fines, &c.

all the said parties to these presents respectively, as far as they respectively can lawfully or rightfully direct the uses of the same fine or fines, common recovery or recoveries, and other assurances, be and enure, and be adjudged, expounded, deemed, decreed, and taken to be and enure, and that the same was and were meant and intended, and is and are hereby directed and declared to be and enure; and also that the person or persons to whom the said fine or fines, common recovery or recoveries, and other assurances respectively, have or hath been, or shall or may be levied, suffered, made, and executed, shall stand and be seised, *As to*, for, and concerning the said manors, messuages, farms, lands, tenements, and hereditaments, hereby bargained and sold, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their rights, royalties, members, and appurtenances, *To the use* of the said G. P. his heirs and assigns for ever. And to no other use, nor upon or for any other trust, intent, or purpose whatsoever. *In witness*, &c.

shall enure,

and persons shall be seised,

As to the manors, &c. conveyed,

To the use of the grantor in fee.

FORM X.

Recovery Deed, by Lease and Release, with various Uses by Way of Family Arrangement.

THIS INDENTURE of four parts, made, &c. 1798. BETWEEN C. H. of, &c. Esq. and M. his wife, of the first part; G. S. of, &c. Esq. of the second part; J. P. of, &c. gentleman, of the third part; and W. W. of, &c. Esq. of the fourth part. WITNESSETH that for barring, docking, destroying, and extinguishing all estates-tail, and all reversions and remainders thereupon expectant or depending, of and in the manors, lands, and hereditaments hereinafter granted and released, or mentioned so to be; and for extinguishing the dower, right, or title of dower of the said M. H. therein; and for limiting and assuring the same manors, lands, and hereditaments, to the uses hereinafter particularly mentioned and expressed; and in consideration of ten shillings, of lawful money, of, &c. to the said C. H. paid by the said G. S, at or before the sealing and delivery of these presents, (the receipt whereof is hereby acknowledged), They the said C. H. and M. his wife, *have* and each of them *hath* granted,

PARTIES.

WITNESSETH. that for barring estates-tail, &c.

extinguishing dower,

and limiting manors to uses;

and for nominal consideration.

Tenant in tail and his

wife grant, &c. to G. S. in fee.

bargained, sold, released, and confirmed, and by these presents *do* and each of them *doth* grant, bargain, sell, release, and confirm unto the said G. S. his heirs and assigns, in his actual possession as hereinafter is mentioned. ALL those the lordships or manors of W. E. and N. in the county of W, with their and every of their rights, royalties, franchises, members, and appurtenances. *And also* all those the two several manors, or reputed manors of Great C. in the said county of W, the one called V. and the other W. G, with their and every of their rights, royalties, franchises, members, and appurtenances. *And also* the advowson, donation, right of presentation, and patronage of the churches of Great C. and B, in the said county of W, with all rights, privileges, and appurtenances, thereunto belonging. *And also* the capital or chief mansion-house of W. aforesaid. *And also* all other the manors, messuages, farms, lands, meadows, leasows, pastures, grounds, mills, fishings, tithes, commons, donations, rents, hereditaments, duties, reliefs, waifs, estrays, deodands, and all other the hereditaments whatsoever of him the said C. H, situate, lying, and being in the manors, townships, parishes, precincts, and liberties of W. E. N, Great C, Little C. P. W. and B. in the county of W, or in any of them, or elsewhere in the said county of W. *Together* with all and singular houses, outhouses, edifices, buildings, barns, stables, dovehouses, orchards, gardens, backsides, privileges, profits, commodities, emoluments, and hereditaments, whatsoever, to the said several manors, lands, hereditaments, and premises belonging, or

Manors.

Advowson.

Mansion.

Sweeping clause.

General words.

in any wise appertaining, or accepted, reputed, taken, or known as part, parcel, or member thereof. (*Except*, nevertheless, and always reserved out of this present release, two messuages, and two yard lands, and a toft of land in the said parish of E. which are copyhold, and held by grant from the Dean and Chapter of W. for three lives, in trust for the said C. H.) *All* which manors, lands, hereditaments, and premises, (except as before excepted,) are now in the actual possession of the said G. S, by virtue of a bargain and sale thereof made to him by the said C. H. and M. his wife, for the term of one whole year, in consideration of five shillings paid to the said C. H. and M. his wife by the said G. S, by indenture bearing date the day next before the day of the date, and executed before the execution of these presents, and by force of the statute made for transferring uses into possession : and were devised to the said C. H. in tail, (after several estates now determined,) in or by the last will of his father E. H, formerly of W. H. aforesaid, Esq. deceased, bearing date on or about the eleventh day of January, 1766, and proved in the Prerogative Court of the Archbishop of Canterbury on or about the fifth day of May next following. *And* the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits thereof, and of every part thereof. *And* all the estate, right, title, interest, trust, property, claim, and demand whatsoever at law and in equity of them, the said C. H. and M. his wife, of, in, to, or out of the said manors, lands, hereditaments, and premises, every, or any part or parcel

Exception of two messuages, &c. held for lives.

Reference to lease for a year.

and to will by which the estate-tail was created.

Reversion, &c.

All the estate, &c.

Habendum to grantee in fee

thereof. To HAVE AND TO HOLD the said manors, lands, hereditaments, and all and singular other the premises with their and every of their appurtenances unto the said G. S. his heirs and assigns for ever, *To the use* of the said G. S. his heirs and assigns for ever. To THE INTENT that the said G. S. may be perfect tenant of the freehold of the same manors, lands, hereditaments, and premises, *to the end* that one or more good and perfect common recovery or recoveries may be thereof had and suffered in manner hereinafter mentioned. And for that purpose it is hereby declared and agreed by and between the said parties to these presents, as far as they respectively are interested, that it shall and may be lawful to and for the said J. P, at the costs and charges of the said C. H, before the end of this present Easter term, to sue forth and prosecute out of his majesty's high court of Chancery, against the said G. S, one or more writ or writs of entry *sur disseisin en le post*, returnable before his majesty's justices of the court of Common Pleas at Westminster, and thereby demand by apt and convenient names, quantities, qualities, number of acres and other descriptions, the said manors, lands, hereditaments, and premises, with the appurtenances. To which said writ or writs of entry the said G. S. shall appear gratis in his own person, and vouch to warranty the said C. H. and M. his wife; who shall also appear gratis in their own persons, or by their attorney or attornies thereto lawfully authorised, and enter into the warranty, and vouch over to warranty the common vouchee of the same court; who shall also appear gratis, and

To make him tenant to the *præcipe*, for suffering a common recovery.

Mode of suffering the recovery prescribed.

after imparlance make default. So that judgment may be given for the said J. P. to recover the same manors, lands, hereditaments, and premises, with the appurtenances, against the said G. S.; and for the said G. S. to recover in value against the said C. H. and M. his wife; and for the said C. H. and M. his wife to recover in value against the common vouchee, as is usual in like cases. And that execution shall and may be thereupon had and awarded accordingly; and all and every other act and thing done and executed which is needful and requisite for suffering and perfecting such common recovery or recoveries with vouchers as aforesaid. AND IT IS HEREBY DECLARED AND AGREED by and between all the said parties to these presents, as far as they respectively are interested, that immediately after suffering and perfecting the said common recovery or recoveries, these presents and the assurance hereby made; and also the said recovery and recoveries so as aforesaid or in any other manner or at any other time or times suffered or to be suffered; and all and every other recovery and recoveries, fine and fines, conveyances and assurances in the law whatsoever at any time or times heretofore, and to be at any time, and from time to time hereafter had, made, levied, suffered, or executed of the said manors, lands, hereditaments, and premises, or any part thereof, by or between the said parties to these presents, or any of them, or whereunto they, or any or either of them are, or is, or shall be parties or privies, or a party or privy, shall be and enure, and shall be adjudged, deemed, construed, and taken, and is and are

Declaration that these presents, and the recovery,

and all other recoveries, &c.

shall enure,

and was and were meant and intended, and is and are hereby directed, declared, and agreed by and between all the said parties to these presents, to be and enure, and the recoveror and recoverors in the said recovery or recoveries, named or to be named, and his and their heirs shall stand and be seised. *As to*, for, and concerning the same manors, lands, hereditaments, and premises, and every part thereof, with the appurtenances. *To, for, and upon such uses*, intents, and purposes, and under and subject to such powers, provisoes, limitations, and agreements as are hereinafter expressed and declared of and concerning the same, (that is to say,) in the first place. *In confirmation* of the right of E. H, eldest sister of the said C. H, to have, take, and receive thereout the clear annual sum of £ to commence from the fifth day of January now last past, and to continue thenceforth during so long time as she the said E. H. shall live in the said mansion-house at W, in which she now resides; and also in confirmation of the right of the said E. H. if she should quit the said mansion-house, and go to reside elsewhere to have, take, and receive out of the said hereditaments the clear annual sum of £ to commence from the time of her so quitting the said mansion-house, and to continue during the term of her natural life, instead of the aforesaid annual sum of £ Which said annuities or yearly rent charges of £ and £ were granted, created, and made payable in and by one indenture tripartite bearing date on or about the day of January last, made between the said C. H. of the first part; the said

As to the manors conveyed,

To confirm the right of E. H. to receive annuities,

granted by a deed referred to.

E. H. of the second part; and the said W. W. of the third part. *And* also in confirmation of such powers of distress and entry for nonpayment of the said annuities, as in the same indenture are for that purpose particularly mentioned and expressed. *And* subject to, and charged and chargeable with the said annuities of £ and £ during the continuance of the same annuities respectively, and also subject to and chargeable with the powers and remedies limited or given to the said E. H. and her assigns, for securing and enforcing the payment of the same annuities, *To the use* of the said C. H. and his assigns, for and during the term of his natural life, without impeachment of waste. And from and after the decease of the said C. H, *To the use* of the said M. H, for and during the joint natural lives of the said M. H, and E. H. *And* in case the said M. H. should die in the life-time of the said E. H, and the said E. H. should survive the said C. H, then from and after the several deceases of the said C. H. and M. his wife, *To the use*, intent, and purpose that the said E. H. shall thenceforth during the term of her natural life have, receive, take, and enjoy one annual sum or yearly rent-charge of £300 of lawful money, &c. to be yearly issuing and payable out of, and charged and chargeable upon all and singular the said manors, lands, and hereditaments hereby released, or otherwise assured, or intended so to be, and to be payable and paid to the said E. H. and her assigns at or in the common dining hall of the Inner Temple, London, on the 5th day of April, the 5th day of July, the 10th day of October, and the 5th day

And the powers for securing the same.

And subject thereto.

To the use of C. H. for life.

Remainder, To the use of M. H. for the joint lives of M. H. and E. H.

And if M. H. shall die before E. H. and E. H. shall survive C. H, then

That E. H. may receive an annuity of 300*l.* for her life.

of January, by even and equal portions, without any deduction or abatement whatsoever thereout, or out of any part thereof, for or in respect of any taxes, charges, rates, impositions, or outgoings whatsoever, at any time or times heretofore, and to be at any time, and from time to time, hereafter, taxed, charged, assessed, or imposed on the said manors, lands, and hereditaments, hereby released, or otherwise assured, or intended so to be, or any of them, or any part thereof, or on the said annual sum or yearly rent charge of £300 or any part thereof, or on the said E. H. or her assigns, in respect of the same, either by authority of Parliament or otherwise, or for or in respect of any other matter, cause, or thing whatsoever; the first payment of the said annual sum or yearly rent charge of £300 to become due and be made on such of the said days of payment as shall happen next after the decease of the survivor of the said C. H. and M. his wife; and the same annual sum or yearly rent charge to be in lieu, and full satisfaction and discharge of the then growing, and also the future payments of the said annual sums or yearly rent charges of £ and £ and each or either of them, and also in full satisfaction and discharge of any claim, annuity or annuities, to which the said E. H. is, or can or may be entitled, under the said will of the said E. H.

in lieu of her present annuities.

And in case the said E. H. should die in the life time of the said M. H. and the said M. H. should survive the said C. H, then from and after the several deceases of the said C. H. and E. H, *To the use*, intent, and purpose that the said M. H. shall thenceforth, during the term of her

And if E. H. shall die before M. H. and M. H. shall survive C. H, then That M. H. may receive an annuity of

natural life, have, receive, take, and enjoy one annual sum or yearly rent charge of £500 of lawful money, &c. to be yearly issuing, going, and payable out of, and charged and chargeable upon all and singular the said manors, lands, and hereditaments hereby released, or otherwise assured, or intended so to be, and to be payable and paid to the said M. H. or her assigns at or in the common dining hall of the Inner Temple, London, on the fifth day of April, the fifth day of July, the tenth day of October, and the fifth day of January, by even and equal portions, and without any deduction or abatement on any account whatsoever, as aforesaid; the first payment of the said last-mentioned annual sum or yearly rent charge of £500 to become due, and to be made on such of the said last mentioned days of payment, as shall happen next after the decease of the survivor of the said C. H. and E. H. And the same annual sum or yearly rent charge of £500, together with the estate hereby limited to the use of the said M. H. for the joint lives of the said M. H. and E. H, to be in full satisfaction for the dower and thirds at common law, and also the freebench and customary estate, and all other estates, claims, and demands which the said M. H. hath or can, shall or may claim to have, of, in, to, and out of all freehold, copyhold, and customary estates of which the said C. H. hath been, or shall or may be seised at any time, and from time to time, during the coverture of the said M. H. by him. *And to this further use*, intent, and purpose, that when and as often as it shall happen that the said annual sum or yearly rent charge of £300

500*l.* for her life.

The life estate and annuity of M.H. to be in lieu of dower, &c.

Power of distress for securing annuities of 300*l.*

and 500*l.* when 14 days in arrear.

hereby limited to the use of the said E. H. and her assigns, or the said annual sum or yearly rent charge of £500 hereby limited to the use of the said M. H. and her assigns, or any quarterly payment of the same, respectively shall be in arrear, or unpaid in the whole, or in part, by the space of fourteen days next over or after any one of the days or times whereon the same respectively are hereinbefore appointed to be paid, as aforesaid; then, and so often and from time to time it shall, and may be lawful to, and for the said E. H. and her assigns, in respect of her said annual sum, or yearly rent of £300, and to and for the said M. H. and her assigns, in respect of her annual sum or yearly rent of £500, into and upon the said manors, messuages, lands, and hereditaments, out of which the same annual sums or yearly rents of £300 and £500 respectively are to be issuing and payable, or into and upon any part thereof to enter, and distrain for the same annual sums, or yearly rents respectively, and all the arrears thereof respectively, and the distress and distresses then and there found to detain, manage, sell, and dispose of, in the same manner in all respects, and upon the same terms as distresses for rents reserved upon leases for years may be, and are or ought to be detained, managed, sold, and disposed of, and as if the said annual sums, or yearly rents of £300 and £500 respectively were rents reserved upon leases for years, *to the intent* that the said E. H. and her assigns, and also the said M. H. and her assigns, shall thereby, therewith, or otherwise be respectively and fully satisfied, and paid the said annual

sums, or yearly rents of £300 and £500, and all the arrears thereof, respectively, and all costs, charges, and expences, to be occasioned to them respectively by the nonpayment thereof at the days or times hereinbefore appointed for the payment of the same respectively. *And to this further use*, intent, and purpose, that from time to time when, and as often as it shall happen that the said annual sums, or yearly rents of £300 and £500 respectively, or any part of the same respectively, shall be in arrear or unpaid by the space of twenty-one days, next over, or after any or either of the said days whereon the said sums, or rents respectively are hereinbefore appointed to be paid, as aforesaid; then, and so often, and from time to time, and either upon or at any time after the expiration of the said twenty-one days, it shall and may be lawful to and for the said E. H. and her assigns, in respect of her said annual sum or yearly rent of £300, and to and for the said M. H. and her assigns, in respect of her said annual sum or yearly rent of £500, (although no formal or legal demand shall have been made of the said annual sums, or yearly rents of £300 and £500 respectively,) into and upon the said manors, messuages, lands, and hereditaments, out of which the said annual sums, or yearly rents are to be issuing and payable as aforesaid, or into and upon any part of the same manors, messuages, lands, and hereditaments in the name of all the same manors and hereditaments, to enter, and the same to have, hold, and enjoy, and the rents and profits thereof, and of every part thereof to receive and take, to and for their own use and

Power of entry for securing annuities of 300*l.* and 500*l.* when 21 days in arrear.

benefit, until they respectively shall thereby or therewith, or otherwise be fully satisfied and paid the said annual sums or yearly rents of £300 and £500 secured to them respectively, and all the arrears thereof respectively, and also so much of the same annual sums, or yearly rents respectively as from time to time shall incur and grow due to them respectively during such time as they respectively shall continue in possession of the premises after every such entry as aforesaid, and also all such costs, losses, charges, damages, and expences, as shall be occasioned by nonpayment of the said annual sums or yearly rents respectively, or of any part thereof, at the days and times aforesaid; and such possession, when taken to be without impeachment of waste. *And* from and after the determination of the estates hereby limited to the use of the said C. H. and his assigns for his life, and to the said M. H. during the joint lives of the said M. H. and E. H.; and subject nevertheless to the said annual sums, or yearly rent charges of £300 and £500, provided for the said E. H. and M. H. respectively as aforesaid, and to the powers and remedies hereby given, limited, and created for securing and enforcing the payment of the same respectively; *To the use* of the said W. W, his executors, administrators and assigns, for and during the term or time of two hundred years, to be computed from the day next before the day of the date of these presents, and fully to be complete and ended, without impeachment of or for any manner of waste, *Upon the trusts*, nevertheless, and for the ends, intents, and purposes hereinafter expressed, declared,

After determination of previous estates,

and subject to the annuities.

To the use of W. W for 200 years.

ed, and contained of and concerning the same term. *And* from and after the determination of the said term of two hundred years, and in the mean time subject thereto, and to the trusts thereof, **To the use* of such person or persons, for such estate and estates, and for such interest and interests, by way of annuity, rent-charge, or otherwise, and in such manner, parts, shares, and proportions, and upon such trusts, and for such ends, intents, and purposes, and charged and chargeable in such manner, and either absolutely or conditionally, and subject to such powers of revocation and of new appointment, and other powers, provisoes, conditions, restrictions, limitations, declarations, and agreements, as the said C. H. at any time or times, and from time to time, by any deed, or deeds, to be sealed and delivered by him in the presence of, and attested by one, two, or more credible witness or witnesses, shall direct, limit, or appoint. *And* in default of such direction, limitation, and appointment, and in the mean time, and from time to time, until the same shall take effect, and from time to time subject to such uses, estates, trusts, charges, and interests as shall have been directed, limited, or appointed by the said C. H.; *To the use* of C. H. of , son of C. H. late of, &c. Esq. deceased, for and during the term of his natural life, without impeachment of waste. *And* from and after the determination of that estate by any means *To the use* of the said G. S. and his heirs, during

Remainder.

To the use of such persons as C. H. shall by deed appoint.

In default of appointment.

To the use of C. H. Junior, for life.

Remainder

To the use of G. S. for life of C. H. Jun.

* Sometimes it may be advisable that a joint power shall to preserve precede the other uses.

contingent remainders.

the natural life of the said C. H. of *Upon trust* to support and preserve the contingent uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions, as the case shall require, yet nevertheless to permit and suffer the said C. H. of , and his assigns, during his life, to receive and take the rents and profits of the same manors, lands, and hereditaments, to and for his and their own use and benefit. *And* from and after the decease of the said C. H. of then *To the use* of the first son of the body of the said C. H. of , lawfully begotten, or to be begotten, and the heirs male of the body of such first son lawfully issuing. *And* on failure of such issue, *To the use* of the second, third, fourth, fifth, and all and every other, son and sons of the body of the said C. H. of , lawfully begotten and to be begotten, severally, and successively, in remainder, one after the other, as they and every of them respectively shall be in seniority of age and priority of birth, and the several and respective heirs male of the body, or several and respective bodies of the same son and sons respectively, lawfully issuing, every elder of the same sons, and the heirs male of his body issuing being always to be preferred to, and to take before every younger of the same sons, and the heirs male of his body issuing. *And* on failure of such issue, *To the use* of the person or persons who at the death of the survivor of the said C. H. party hereto, and C. H. of shall be the heir, or co-heirs of the said C. H. party hereto, and the heirs, or assigns of the same person or person,

Remainder,

To the use of the first son of C. H. Jun. in tail male.

Remainder,

To the use of the second and other sons of C. H. Jun. successively in tail male.

Remainder,

To the use of the person answering the description of heir at law to C. H., in fee.

respectively, to be divided between the same persons, if more than one, as tenants in common, and not as joint-tenants, and in the same shares and proportions, either equally or unequally, as they would have been intitled to a real estate descending from the said C. H. party hereto, and vesting at that time in them as his co-heirs. *And it is hereby declared and agreed*, by and between the parties to these presents as far as they respectively are interested, that the said term of two hundred years hereby limited to the use of the said W. W, his executors, administrators, and assigns, is limited to him and them upon the several trusts, and for the several ends, intents, and purposes hereinafter expressed and declared of and concerning the same, (that is to say) *Upon trust* for securing to the said E. H. and M. H. respectively, and their respective assigns, the due and regular payment of the said annual sums or yearly rents of £300 and £500 hereby limited to the use of the said E. H. and M. H. respectively, when and as the same annual sums or yearly rents respectively shall become due and payable; and for that purpose in case, and when and as often as the said annual sums or yearly rents of £300 and £500 respectively, or any payment thereof respectively, shall be in arrear and unpaid, in the whole, or in part, by the space of twenty-eight days next after any one of the days or times hereinbefore appointed for payment thereof respectively, then and in that case, and from time to time as often as it shall so happen, it shall and may be lawful to and for the said W. W, his executors, administrators, or assigns, by and

Declaration that the term of 200 years is limited.

Upon trust for securing the regular payment of the annuities of 300*l.* and 500*l.*,

and after 28 days default,

out of the rents, issues, and profits of the said hereditaments and premises hereby limited to the use of the said W. W. as aforesaid, for the said term of two hundred years; or by mortgage or sale of the said hereditaments and premises, or of a competent part thereof, for all or any part of the said term of two hundred years; or by bringing actions against, or making distresses upon, all and every or any of the present or future tenants of the said hereditaments, and premises for the recovery of the rents then in arrear; or by making entries upon the same hereditaments and premises; or by all and every or any one or more of the said ways and means, or by any other lawful and reasonable ways and means whatsoever, to levy and raise such arrears of the said annual sums or yearly rents of £300 and £500 respectively as from time to time shall become due, and remain unpaid, together with all such damages, costs, charges, and expences, as the said E. H. and M. H. respectively or their respective assigns shall incur, expend, sustain, or be put unto by reason of the nonpayment of the said annual sums or yearly rents of £300 and £500 respectively, or any part thereof respectively, together with the costs, charges, and expences attending the execution of the trusts of the said term of two hundred years. *And upon this further trust* that the said W. W, his executors and administrators, do and shall in the first place retain and reimburse to and for himself and themselves, the costs, charges, and expences of and attending the execution of the trusts hereby reposed in him or them; *and in the next place* pay and satisfy to the said E. H. her

to raise the annuity, and attendant expences.

And in trust to reimburse the trustee his expences,

and to pay to annuitants

executors, administrators, or assigns, all arrears of her said annual sum or yearly rent of £300, and all costs, charges, damages, and expences which she and they shall have incurred, suffered, borne, sustained, and laid out by reason or on account of the nonpayment of her said annual sum, or yearly rent of £300, or in or about recovering and enforcing the payment of the same; *and afterwards* do and shall pay and satisfy to the said M. H, her executors, administrators, and assigns, all arrears of her said annual sum or yearly rent of £500, and all costs, charges, damages, and expences which she and they shall have incurred, suffered, borne, sustained, and laid out by reason or on account of the nonpayment of the said last mentioned annual sum or yearly rent of £500, or in or about recovering and enforcing the payment of the same. *And upon this further trust*, that after the determination of the several estates hereby limited to the use of the said C. H, party hereto, for his life, and to the said M. H. for the joint lives of herself, and the said E. H, and thenceforth until the said C. H, of shall attain his age of twenty-five years, or the time shall arrive when he would have attained that age in case he had lived, (and subject and without prejudice to the power of appointment hereinbefore contained) the said W. W, his executors, administrators, or assigns, do and shall receive all the rents and annual income of the said manors, lands, hereditaments, and premises comprised in the said term of two hundred years, which shall remain after satisfying the said several annuities of £300 and £500, during the continuance of the same annuities re-

their several annuities in succession.

And upon further trust, after the determination of the estates of C. H. and M. H, and till C. H. Jun. shall attain 25,

to receive the surplus rents;

and apply the same in keeping down the interest of incumbrances, and reducing the principal.

spectively; and do and shall apply the same surplus rents in keeping down the interest of the incumbrances, (if any,) then affecting the premises, and also in discharging so much and such part of the principal money of the same incumbrances as can be satisfied out of any rents which shall remain after discharging such interest as aforesaid.

And after C. H. Jun. shall attain 25,

And upon this further trust, that after the said C. H, of shall have attained the said twenty-five years, or the time shall arrive when he, if living, would have attained that age, and thenceforth in the mean time and until the said annual sums or yearly rents of £300 and £500 or one of them, or some quarterly payment of them or one of them shall be in arrear or unpaid, in the whole, or in part, by the space of twenty-eight days after the time hereby appointed for payment of the same; and also thenceforth and from time to time when and as often as all the arrears of the said annual sums or yearly rents of £300 and £500 or such of them as shall be subsisting, and the said costs, charges, damages, and expences shall be raised, or fully satisfied and paid; the said W. W, his executors and administrators, do and shall permit and suffer such person or persons as for the time being shall be entitled to the reversion or remainder of the same hereditaments and premises, comprised in the said term of two hundred years, expectant on the determination of the same term, to receive and take the rents and profits of the same hereditaments and premises, to and for his and their own use and benefit. *And upon this further trust*, that the said W. W, his executors and administrators, do and shall, from

(until annuities shall be in arrear,

and also when annuities shall be satisfied,)

to permit the persons in remainder to receive the rents.

And to pay to persons in remainder the money re-

time to time, after paying the said annual sums or yearly rents of £300 and £500 when and as the same respectively shall become due and payable, and also after the said C. H. of shall attain his age of twenty-five years, or after the time when he, if living, would have attained that age; and also after paying, deducting, and retaining such costs, charges, damages, and expences as aforesaid; pay to the person or persons who shall be entitled to the reversion or remainder of the said hereditaments and premises, comprised in the said term of two hundred years, expectant on the determination of the said term, or to whom he, she, or they shall direct or appoint, the money, (if any,) which from time to time shall remain in the hands of the said W. W, his executors or administrators. *Provided always*, and it is hereby declared and agreed, by and between the parties to these presents, that after the decease of the survivor of the said E. H. and M. H, and payment to them respectively, and their respective executors, administrators, or assigns of the said annual sums or yearly rents of £300 and £500 and all the arrears thereof respectively; and also after the said C. H, of shall have attained his age of twenty-five years, or the time shall arrive when he, if living, would have attained that age; and payment of all costs, charges, damages, and expences as aforesaid; and also after full performance or discharge of the trusts of the said term of two hundred years; then and thenceforth the said term of two hundred years, of or in the hereditaments and premises comprised therein, or so much of the same term as shall not be disposed

remaining in the hands of the trustee.

Proviso for cesser of the term on performance of the trusts.

of under the trusts hereby declared concerning the same term, shall cease, determine, and be void, but without prejudice to any sale, mortgage, or disposition, previously made of all or any part of the hereditaments and premises comprised in the said term of two hundred years, for any of the purposes hereinbefore mentioned, in pursuance of the trusts hereinbefore declared concerning the same term. *And* it is hereby provided, declared and agreed, by and between the parties to these presents, and the said C. H. party hereto, doth hereby direct and appoint, that the person or persons who shall pay to the said W. W, his executors, administrators, or assigns, all or any part of the rents, issues, and annual profits of the said manors, lands, and hereditaments hereby released, or otherwise assured, or intended so to be, or advance any money upon any sale or sales, or the security of any mortgage or mortgages of the same manors, lands, and hereditaments, or any part of the same, or otherwise pursuant to the trusts hereinbefore contained, shall not be obliged or required, to see the application of the said rents, issues, profits, and money respectively, or any of them, or be answerable or accountable for the misapplication or non-application of the same. *And* that all receipts which shall be given by the said W. W, his executors, administrators or assigns, for all or any part of the said rents, issues, profits, and money respectively, shall be good and sufficient acquittances and discharges, for the sum and sums of money which by the said receipts respectively, and every of them, shall be acknowledged or expressed to be, or to have been received. And that

Proviso for indemnity of persons paying money to the trustee.

Receipts of trustee to be good discharges.

all sales and mortgages which shall be made, and contracts for sale which shall be entered into, and conveyances which shall be executed, by the said W. W, his executors, administrators, or assigns, shall, without any further consent or concurrence by, or on the part of the person or persons who for the time being shall be intitled in reversion or remainder as aforesaid, be binding and conclusive on them respectively, in the same manner to all intents and purposes as if such sales or mortgages had been made, and contracts for sale entered into, and conveyances executed by him or them respectively. *Provided always* and it is hereby declared and agreed, by and between the parties to these presents, that notwithstanding any of the uses hereinbefore declared, or the powers hereinafter contained; but subject and without prejudice to any of the said annuities during the continuance of the same respectively, and also subject and without prejudice to the said powers and remedies by distress and entry for recovering and enforcing the payment of the same annuities; it shall or may be lawful to and for the said C. H. party hereto, during his life, and after his decease to and for the said M. H, during the joint lives of herself and the said E. H, and after the determination of their several estates, to and for the said C. H, of during his life, and also to and for the guardian or guardians in socage for the time being of any infant son of the said C. H. the son, who for the time being shall be tenant in tail in possession under the limitations hereinbefore contained during the minority of the same son, or to or for the trustee or trustees, for the

and sales, &c. of trustee to be binding.

Power of leasing for 21 years.

time being, of the said term of 200 years, when there shall not be any such guardian or guardians, or such guardian or guardians shall refuse or decline to act in the execution of this power, by indenture or indentures to be sealed and delivered by him, her, or them respectively, in the presence of and attested by two or more credible witnesses, to limit and appoint, by way of demise or lease, all or any part or parts of the said manors, lands, hereditaments, and premises hereby released, or otherwise assured, or intended so to be, with the appurtenances, except, &c. to any person or persons for any term or number of years not exceeding twenty-one years, from the day of the date of the indenture of limitation or appointment by way of demise or lease; and to take effect in possession either immediately, or within three years; so as there shall be reserved on every such limitation or appointment by way of demise or lease, the best or most improved yearly rent or rents, to be incident to the immediate reversion of the hereditaments so to be limited or appointed, that can or may be reasonably had or gotten for the same, without taking any fine, premium, or foregift, for making thereof; and so as there shall be contained in each such indenture of limitation or appointment by way of demise or lease, a condition of re-entry for non-payment of the rent or rents, to be thereby respectively reserved, by the space of twenty-one days after the same rents respectively shall become due and payable; and so as the person or persons respectively to whom each such limitation or appointment by way or in the nature of demise or lease shall be

respectively made, shall execute a counterpart of the indenture or indentures to be made to him, her, or them respectively, and thereby covenant for the due payment of the rent or rents, to be thereby respectively reserved; and so as the person or persons respectively to whom each such limitation or appointment shall be made, his, her, or their executors, administrators, or assigns, shall not by any clause or words to be contained in any such indenture or indentures, be made dispunishable for waste, or exempted from punishment for committing waste. *Provided also*, and it is hereby declared and agreed by and between the parties to these presents, that, subject and without prejudice to the said power of leasing; but notwithstanding any of the uses, estates, or charges hereby limited or created, (except the leases to be made as aforesaid); it shall or may be lawful to and for the said E. H. by any deed or deeds, instrument or instruments in writing, to be sealed and delivered by her in the presence of two or more credible witnesses, and to be attested by the same witnesses, or by her last will and testament in writing, or any writing in the nature of her last will and testament, or any codicil or codicils thereto, to be respectively signed, published, and declared by the said E. H, in the presence of three or more credible witnesses, and to be attested in her presence by the same witnesses, to raise any sum or sums of money, not exceeding £3000, for the benefit of any person or persons, by charging the same on all or any of the hereditaments mentioned or comprised in the said indenture of the

Power for E. H. to charge with £3000.

day of January last, (being part of the hereditaments hereby released, or otherwise assured, or intended so to be,) and that for securing such money with interest for the same, at any rate not exceeding £5 per cent. per annum, it shall or may be lawful to and for the said E. H, by the same deed or deeds, instrument or instruments, will or wills, codicil or codicils, or by any other deed or deeds, instrument or instruments in writing, or by her last will and testament in writing, or any writing in the nature of her last will and testament, or any codicil or codicils thereto, to be executed and attested as aforesaid, to limit and appoint the hereditaments, so to be charged, to any person or persons whomsoever, for any term or terms of years, whatsoever; so as the estate or estates to be limited or appointed as aforesaid, shall be made subject to redemption on payment at an appointed day or time, days or times, of the money so to be charged, and the interest thereof, by the person or persons who shall be intitled to the same hereditaments in remainder or reversion immediately expectant on the expiration of the same term or terms of years respectively. *Provided also*, and it is hereby further declared and agreed by and between the parties to these presents, that subject and without prejudice to the said power of leasing; and also subject and without prejudice to the power hereby given to the said E. H. to raise any sum not exceeding £3000 as aforesaid; and subject and without prejudice to the term of years, if any, which shall be limited under and by virtue of that power; and notwithstanding any other of the

Power for C. H. to charge with £10,000.

uses, estates, or charges hereby limited or created; it shall or may be lawful to and for the said C. H. party hereto, by any deed or deeds, instrument or instruments in writing, to be sealed and delivered by him in the presence of two or more credible witnesses, and to be attested by the same witnesses, or by his last will and testament in writing, or any codicil or codicils thereto, to be respectively signed, published, and declared by him in the presence of three or more credible witnesses, and to be attested in his presence by the same witnesses, to raise any sum or sums of money not exceeding £10,000, for his own benefit, or the benefit of any other person or persons, by charging the same on all or any of the hereditaments, hereby released, or otherwise assured, or intended so to be: and that for securing such money with interest for the same, it shall and may be lawful for the said C. H. party thereto, by the same deed or deeds, instrument or instruments, will or wills, codicil or codicils, or by any other deed or deeds, instrument or instruments in writing, or by his last will and testament, or any codicil or codicils thereto, (to be executed and attested as aforesaid,) to limit and appoint the hereditaments, so to be charged by him the said C. H. party hereto as aforesaid, to any person or persons whomsoever for any term or number of years whatsoever; so as the estate or estates to be limited or created by the said C. H. party hereto as aforesaid, shall be made subject to redemption on payment at an appointed day or time, days or times, of the money and interest so to be charged by the said

C. H. party hereto, as aforesaid, by the person or persons who shall be entitled to the hereditaments to be comprised in the same term or terms respectively, in remainder or reversion, immediately expectant upon the expiration of the same term or terms of years respectively. *Provided further*, and it is hereby declared and agreed by and between the parties to these presents, that in case the full amount of the said sum of £10,000 shall not be charged by the said C. H. party hereto, under the power hereby given or reserved to him in that behalf, then subject and without prejudice to the said annuities, and the several other powers hereinbefore contained, and the estates and interests which shall be limited, charged, or created under, and by virtue of the same powers; but notwithstanding, any of the uses hereinbefore limited, it shall or may be lawful to and for the said M. H, either in the life-time or after the death of her said husband, and notwithstanding her coverture, by any deed or deeds, instrument or instruments in writing, to be sealed and delivered by her in the presence of two or more credible witnesses, and to be attested by the same witnesses, or by her last will and testament in writing, or any writing in the nature of, or purporting to be her last will and testament, or any codicil or codicils thereto, to be respectively signed, published, and declared by her in the presence of three or more credible witnesses, and to be attested in her presence by the same witnesses, and either for her own benefit or the benefit of any person or persons whomsoever, to charge any sum or sums of money on all

Power, (if the whole £10,000 shall not be charged by C. H.)

for M. H. (notwithstanding coverture,)

to charge with any sum

or any of the hereditaments hereby released, or otherwise assured or intended so to be, together with interest for the same, from or at any time after the death of the said C. H. party hereto, so as the principal sum or sums of money to be charged by the said M. H. shall not exceed £5,000, or together with, and inclusive of the principal money to be charged by the said C. H. party hereto, shall not exceed the sum of £10,000, and that for securing the money to be charged by the said M. H. as aforesaid, with interest for the same, it shall or may be lawful to and for the said M. H. by the same deed or deeds, instrument or instruments, will or wills, writing or writings, codicil or codicils, or by any other deed or deeds instrument or instruments in writing, will or wills, writing or writings, or codicil or codicils, to be executed and attested as aforesaid, to limit and appoint the hereditaments so to be charged by the said M. H. to any person or persons whomsoever for any term or terms of years whatsoever; so as the estate or estates to be limited or created by the said M. H. as aforesaid, shall be redeemable on payment at an appointed day or time, days or times, of the money and interest so to be charged by the said M. H. as aforesaid, by the person or persons who shall be intitled to the hereditaments to be comprised in the same term or terms respectively, in remainder or reversion immediately expectant on the determination of the same term or terms respectively. AND WHEREAS either under the said will of the said E. H, or otherwise, the said C. H. party hereto is seised or intitled in equity to the said two messuages, and two yard lands and toft of land in the

not exceeding £5,000,

or including money charged by C. H. not exceeding £10,000.

Recital that C. H. is entitled to copyhold messuages, &c. for 3 lives,

said parish of E. which are copyhold and held by grant from the Dean and Chapter of W, for the lives of J. C. the said C. H. of , and J. W.

INDENTURE WITNESSETH, and C. H. covenants, that he will surrender the same copyholds,

NOW THIS INDENTURE ALSO WITNESSETH, and it is hereby granted, declared, and agreed, and the said C. H. party hereto, doth hereby for himself, his heirs, executors, and administrators, covenant with the said G. S. his executors and administrators, that he the said C. H. party hereto, and his trustees shall or will at the next court, to be holden for the manor of which the said copyhold messuages, lands, and premises are parcel, either in person, or by attorney, surrender into the hands of the lord or lords of the said manor, according to the custom of the said manor, the said two copyhold messuages, yard lands, and toft of land, with the appurtenances, to the intent that the same may be regranted to the said G. S. and his heirs for the lives of the said J. C, C. H. of , and J. W, to be held by copy of court roll, according to the custom of the same manor, by the rents, suits, and services therefore due and of right accustomed to be paid. *And* that in the mean time, and until such surrender shall be made, he the said C. H. party hereto, and his trustees shall stand and be seised or possessed of, or intitled to the same copyhold messuages, lands and premises, with the appurtenances, upon the trusts, and for the ends, intents and purposes hereinafter expressed and declared of and concerning the same. *And it is hereby declared* by and between the parties to these presents, that when and as soon as the said copyhold messuages, lands, and premises, shall be granted to the said G. S, his heirs and assigns, the said G. S, his heirs

that the same may be regranted to G. S.

and till such surrender will stand seised upon the trusts after declared.

Declaration that when copyholds shall be granted to G. S., he will stand seised,

and assigns, shall stand and be seised, or possessed of, or intitled to the same, *Upon trust* for such person or persons, for such estate and estates, and for such ends, intents, and purposes, and in such manner and form, parts, shares, and proportions, as the said C. H. party hereto, either absolutely, or with or without power of revocation and new appointment, by any deed or deeds, instrument or instruments, in writing, under his hand and seal, to be attested by two witnesses or by his last will and testament, in writing, or any codicil or codicils thereto, to be severally and respectively signed, published, and declared by him in the presence of two or more credible witnesses, and to be attested in his presence by the same witnesses, shall direct or appoint. *And* for want of such direction or appointment, and in the mean time and until the same shall be made, and take effect, and subject to such interests as from time to time shall have been directed or appointed, then *Upon such trusts*, and for such ends, intents, and purposes as will correspond with the uses, trusts, ends, intents, and purposes, powers, provisoes, declarations, and agreements hereinbefore limited, expressed, and declared of and concerning the manors, lands, and hereditaments hereby released, or otherwise assured or intended so to be. AND IT IS HEREBY FURTHER PROVIDED, declared, and agreed, by and between the parties to these presents, that in case the said W. W, or any trustee, who for the time being shall be appointed under this present provision in his place, shall depart this life, or be desirous of being discharged of and from the aforesaid trusts, or shall go to reside beyond seas, or

Upon trust for such persons, &c. as C. H. shall by deed or will appoint.

And in default of appointment.

Upon trusts corresponding with the uses of the freehold estates.

Power to appoint a new trustee.

shall neglect or refuse to act in the said trusts, before the said trusts shall be fully executed and performed, then and in that case, and as soon and as often as the same shall happen, it shall and may be lawful to and for the said C. H. party hereto, his executors or administrators, to nominate any fit person to supply the place of the trustee so dying, desiring to be discharged, or going to reside beyond seas, or refusing or neglecting to act as aforesaid. And that immediately after every such appointment, the said trust estates shall be conveyed, surrendered, assigned, and transferred, so and in such manner that the same may vest in such new trustee, and in his heirs, executors, administrators, and assigns, upon the trusts hereinbefore expressed and declared of and concerning the same respectively. And that every such new trustee shall have or may exercise the same powers, privileges, and authorities, as if he had been appointed a trustee by these presents, and as if his name had been inserted in these presents, instead of the name of the trustee hereby appointed. AND IT IS HEREBY DECLARED and agreed, by and between all the parties to these presents, that the said trustee hereby nominated and appointed, and the trustee to be appointed in pursuance of the provision last hereinbefore contained, and the heirs, executors, administrators, and assigns of such trustee for the time being, shall be charged and chargeable only for such money as he and they shall actually receive by virtue of the trusts hereby reposed in him and them; and shall not be answerable or accountable for any banker, goldsmith, broker, or other person or persons with whom or in whose hands

Proviso for indemnity of trustees.

any part of the said trust money shall or may be deposited or lodged for safe custody, or otherwise in the execution of the trusts hereinbefore contained, nor for any other misfortune, loss, or damage which may happen in the execution of the aforesaid trusts or in relation thereunto, except the same shall happen by or through his or their own default respectively; and that in case of any such loss or damage by wilful default, the same shall be answered and made good by the person or persons only by whose default the same loss or damage shall happen or arise. And also that it shall and may be lawful to and for the said trustee, his heirs, executors, administrators, and assigns, by and out of the money which shall come to his or their hands by virtue of the trusts aforesaid, to retain and reimburse to and for himself and themselves respectively, all costs, charges, damages, and expences which he and they, or any of them, shall or may suffer, sustain, expend disburse, be at, or be put unto, in or about the execution of the aforesaid trusts, or in relation thereunto.

Covenant by the settler for further assurance.

And the said C. H. party hereto, doth hereby for himself, his heirs, executors, and administrators, covenant and agree to and with the said G. S. his heirs and assigns, that he the said C. H. party hereto, and his heirs, and all persons whosoever, lawfully or equitably and rightfully claiming, or to claim, any estate, right, title, trust, charge, or interest, at law or in equity, of, in, to, out of, or upon the said manors, lands, hereditaments, and premises, hereby released, or otherwise assured, or intended so to be, or any of them, or any part thereof, by, from, under, or in trust for him or them, shall and will, from time to time,

and at all times hereafter upon every reasonable request, and at the costs and charges in all things of any person or persons intitled to any benefit under the uses or trusts hereinbefore declared, make, do, acknowledge, levy, suffer, execute, and perfect, or cause or procure to be made, done, acknowledged, levied, suffered, executed, and perfected, all such further and other lawful and reasonable acts, deeds, devices, conveyances, and assurances in the law whatsoever, either by fine or fines, with or without proclamations, common recovery or recoveries, deed or deeds, inrolled or not inrolled, release, confirmation, or other assurances whatsoever, for further, better, more perfectly, lawfully, and absolutely or satisfactorily granting, releasing, confirming, or otherwise assuring the said manors, lands, hereditaments, and premises hereby released, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their rights, royalties, members, and appurtenances, to the uses, upon the trusts, and for the ends, intents, and purposes, and under and subject to the powers, provisoes, declarations, and agreements hereinbefore limited, expressed, and declared of and concerning the same, or as near thereto as may be, and the deaths of parties, the change of interests, and other intervening circumstances will admit, and according to the true intent and meaning of these presents, as by the person or persons by whom such request shall be made, or his, her, or their counsel in the law shall be reasonably devised, or advised, and required, and tendered to be made, done, and executed. *In witness*, &c.

FORM XI.

Recovery Deed for the joint Lives of the Tenant for Life, and Tenant in the Writ of Entry.

Husband and Wife seised in Right of the Wife for her Life, join in the Conveyance to the Use of different Persons as Tenants in different Writs of Entry, the Lands being partly in England, and partly in Wales: and Uses are declared in Confirmation of the Estate for Life, &c.

THIS INDENTURE of five parts, made the day of 46th Geo. III. 1806. BETWEEN A. M. of, &c. Esq. and E. his wife, (formerly the wife, and afterwards the widow of R. D. of B. in the county of S, gentleman,) of the first part; W. H. D. of, &c. Esq. of the second part; S. W. of, &c. gentleman, of the third part; A. B. of the fourth part; and C. D. of the fifth part. Parties.

WHEREAS the said A. M. and E. his wife, in right of the said E, are tenants for her life of the messuages, lands, tenements, and hereditaments hereinafter described, and hereby released, or otherwise assured or intended so to be. Recital that husband and wife (in right of the wife) are tenants for life.

AND WHEREAS the said W. H. D. is the son of W. H. D. deceased, who was the nephew of the said R. D, and as such the said W. H. D. party hereto, is tenant in tail male of the same messuages, lands, tenements, and hereditaments, with the appurtenances. And that W. H. D. is tenant in tail.

AND WHEREAS the said W. H. D. party hereto, is also the great nephew and heir And heri of a former owner.

That tenant in tail is desirous of suffering recoveries.

That tenants for life have agreed to join in conveyance.

Witnesseth that for barring estates-tail, &c.

And for nominal consideration.

Tenants for life,

and also tenant in tail,

release, &c.

to S. W.

at law of the said R. D. And whereas the said W. H. D. party hereto, is desirous of suffering two or more common recoveries of the said messuages, lands, tenements, and hereditaments, with the appurtenances; And at the instance, and upon the request of the said W. H. D. party hereto, the said A. M. and E. his wife have agreed to join in the conveyance hereinafter contained, for the purpose of enabling the said W. H. D. party hereto, to suffer the same recoveries with effect. Now this indenture witnesseth, that, for docking, barring, and destroying all estates tail of and in the messuages, farms, lands, and hereditaments hereinafter described, and hereby released, or otherwise assured, or intended so to be, and all reversions and remainders expectant or depending on the same estates-tail, and all conditions and collateral limitations annexed to the same estates-tail; and also in consideration of ten shillings, of lawful money, current in Great Britain, to each of them the said A. M. and E. his wife, and W. H. D. party hereto, well and truly paid by the said S. W. immediately before the execution of these presents, (the receipts whereof are hereby acknowledged,) The said A. M. and E. his wife, at the instance and request of the said W. H. D. party hereto, testified by his executing these presents; and also the said W. H. D. party hereto, according to their several and respective estates and interests, *have*, and each and every of them *hath* bargained, sold, and released, And by these presents *do* and each and every of them *doth* bargain, sell, and release unto the said S. W. and his assigns, (in the actual possession of

the said S. W. now being, in virtue of a bargain and sale thereof made to him by the said A. M. and E. his wife, and W. H. D. party hereto, in consideration of five shillings, paid to each of them by the said S. W, by indenture bearing date on the day next before the day of the date, and executed before the execution of these presents, for one whole year, to be computed from the day next before the day of the date of the same indenture of bargain and sale, and by force of the statute made for transferring uses into possession); ALL, &c. [*premises in the counties of S. and F.*] *And* all houses, &c. [*general words for farms*]; *And* the reversion, &c. TO HAVE AND TO HOLD the said messuages, farms, lands, hereditaments, and all and singular other the premises hereby released, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their rights, members and appurtenances, unto the said S. W. and his assigns, for and during the joint natural lives of the said E. M. and S. W, nevertheless *To the uses* hereinafter declared of and concerning the same messuages, farms, lands, and hereditaments respectively, with the appurtenances, (that is to say) *As to*, for, and concerning all such and so many, and such parts of the same messuages, farms, lands, and hereditaments, with the appurtenances as are situate in the said county of S. *To the use* of the said S. W. and his assigns, for and during the term of the joint natural lives of the said E. M. and S. W, and for the intents and purposes hereinafter expressed and declared of and concerning his estate; *And as to*, for, and concerning all such, and so many and

(reference to lease for a year.)

PARCELS, in England and Wales.

HABENDUM to S. W, for the joint lives of *cestui que vie*, and tenant in the writ.

As to lands in England,

To the use of S. W. for the joint lives.

And as to lands in Wales,

such parts of the same messuages, farms, lands, and hereditaments, with the appurtenances as are situate in the said county of F. *To the use* of the said A. B. for and during the term of the joint natural lives of the said E. M. and S. W, and to the intents, and for the purposes hereinafter expressed and declared of and concerning the estate of the said A. B. AND IT IS HEREBY DECLARED and agreed by and between the said parties to these presents, as far as they respectively are interested, that the said messuages, farms, lands, and hereditaments respectively, with the appurtenances, so limited to the use of the said S. W. and A. B. respectively, and their respective assigns, are so limited to them respectively, *To the intent* that each of them the said S. W. and A. B. respectively may, as to the said messuages, farms, lands, and hereditaments respectively, so limited to his use, and every part and parcel of the same with the appurtenances, be tenant of the freehold thereof, *To the end* that one or more good and perfect common recovery or recoveries with double voucher, may be had and suffered of the same hereditaments. *And* for that purpose it is hereby directed, declared, and agreed by and between all the said parties to these presents, that the said S. W. shall permit and suffer the said C. D, or some other person or persons, at the costs and charges in all things of the said W. H. D. party hereto, his heirs, executors, or administrators, at any time or times hereafter to sue forth and prosecute against him the said S. W. out of his majesty's high court of Chancery, one or more writ or writs of entry, *sur*

To the use of A. B. during the joint lives,

DECLARATION that the lands are limited to S. W. and A. B. respectively,

to make each of them tenant to the præcipe of the lands limited to him,

for suffering two recoveries.

One recovery to be suffered on a writ of entry, for the lands in England.

disseisin en le post, returnable before his majesty's justices of the court of Common Pleas at Westminster; and thereby demand of the said S. W. the said messuages, farms, lands, and hereditaments, situate in the said county of S, and hereinbefore limited to the use of the said S. W. and his assigns, by the names and descriptions of six messuages, nine stables, fourteen shippens, six barns, one dove-cote, eight gardens, three hundred acres of land, two hundred acres of meadow, two hundred acres of pasture, and six acres of land covered with water; and common of pasture for all manner of cattle, with the appurtenances in M. N. N. in H. and B. and in the parishes of N. in H. and D. in H. *And* that the said A. B. shall permit and suffer the said C. D, or some other person or persons, at the costs and charges in all things of the said W. H. D, party hereto, his heirs, executors, or administrators, at any time or times hereafter, to sue forth and prosecute against him the said A. B. one or more writ or writs of *quod ei deforceat*, in the nature of a writ or writs of entry, *sur disseisin en le post*, and to be returnable before his majesty's justice or justices of great session for the said county of F.; and thereby demand of the said A. B. the said messuages, farms, lands, and hereditaments with the appurtenances, situate in the said county of F, and limited to the use of the said A. B. and his assigns, by the names and descriptions of one messuage, one stable, three shippens, two barns, two gardens, one hundred acres of land, fifty acres of meadow, fifty acres of pasture, and two acres of land covered with water, and common of

The other recovery to be suffered on a writ of *quod ei deforceat* for the lands in Wales.

pasture for all manner of cattle, with the appurtenances in M. G. and parish of M. G. *Or* each of them the said S. W. and A. B. respectively, shall permit the said C. D. to demand the same messuages, farms, lands, and hereditaments respectively, by such other apt, good, sufficient, and proper names, number of messuages and acres, quantities, qualities, and other descriptions as shall be deemed necessary, proper, sufficient, and requisite to comprise the same. *And* that each of them the said S. W. and A. B. respectively shall in his own person, or by his attorney or attornies lawfully authorised in that behalf, appear to the same writ or writs, and vouch to warranty the said W. H. D. party hereto. And that the said W. H. D. party hereto, shall in his own person, or by his attorney or attornies lawfully authorised in that behalf, appear gratis, and freely enter into the warranty of each of them the said S. W. and A. B. respectively; and taking the same upon himself, vouch over to warranty the common vouchee for the time being, of each of the said courts respectively. And he shall appear gratis, and freely enter into the warranty of the said W. H. D. party hereto; and after imparlance make default. So that judgment may be given upon each of the said writs respectively for the said C. D, or other demandant or demandants, to recover all and singular the said messuages, farms, lands, and hereditaments to be demanded by the same writ respectively, and every part and parcel of the same, with the appurtenances, by such names, quantities, qualities, and other descriptions as aforesaid, against the tenant in the same writ;

Mode of prosecuting both recoveries prescribed.

and for the tenant in the same writ to recover in value against the said W. H. D. party hereto; and for him to recover in value against the common vouchee of the court in which the said writ shall be returnable, as is usual in such cases. And that upon all and every recovery and recoveries to be suffered as aforesaid, execution may be sued and prosecuted by, and seisin had, taken, and delivered unto the said C. D, or other demandant or demandants, accordingly. And that every other act or thing needful, requisite, or proper, to be executed for the purpose of suffering and perfecting a common recovery or recoveries of the messuages, farms, lands, and hereditaments in each of the same counties respectively, with double, treble, or other voucher, to dock the estate-tail of the said W. H. C. party hereto, of and in the same messuages, farms, lands, and hereditaments, and all reversions and remainders over and expectant upon the same estate-tail, may be made, done, and executed. *And* by way of direction and declaration, and not of covenant, it is hereby granted, declared, and agreed, by and between the said parties to these presents as far as they respectively are interested, and they hereby for themselves severally and respectively, and for their several and respective heirs, executors, and administrators, consent and agree according to their respective estates, rights, and interests in the premises, that each of the recoveries hereby agreed to be suffered shall be suffered and perfected with all possible dispatch; and that the parties respectively, and their respective heirs, on their respective parts, will use their utmost

to bar the estate-tail, &c.

Direction that the recoveries shall be suffered.

and that the parties will give effect to the same.

endeavours to give effect to the same recovery, and also to these presents, and the grant, release, and confirmation, or other assurance hereby made. AND IT IS HEREBY FURTHER DIRECTED, declared, and agreed by and between all the said parties to these presents as far as they respectively have any right, title, or interest in the premises, that immediately upon and after judgment obtained and seisin had and taken upon each such recovery, as aforesaid, the recovery, so as aforesaid, or in any other manner, or at any other time or times, to be suffered; and also the said bargain and sale for a year, bearing date on the day next before the day of the date of these presents; and also these presents and the assurance hereby made, and all and every other fine and fines, recovery and recoveries, and other assurances whatsoever at any time or times heretofore, and to be at any time, and from time to time hereafter, had, made, done, levied, suffered, executed, and perfected, of or concerning all or any part of the said messuages, farms, lands, and hereditaments, hereby released, or otherwise assured, or intended so to be, either by themselves solely and alone, or jointly and together with any other lands, tenements, or hereditaments, by and between all and every, or any or either of the persons who are parties to these presents, or to which they or any or either of them is or are, or shall or may be parties or privies, or a party or privy, shall as to all the said parties to these presents respectively, as far as they respectively can lawfully or rightfully direct the uses of the same fine or fines, common recovery or recoveries, and other assurances,

Declaration that recoveries,

and the lease for a year, and the present deed, and all other fines, &c.

be and enure, and be adjudged, expounded, deemed, decreed, and taken to be and enure, and that the same is and are, and was and were meant and intended, and is and are hereby directed and declared to be and enure; and also that the person or persons to whom the said fine or fines, common recovery or recoveries, and other assurances respectively have or hath been, or shall or may be levied, suffered, made and executed, shall stand, and be seised, *as to*, for, and concerning the said messuages, farms, lands, and hereditaments hereby released, or otherwise assured or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances; *To the uses*, upon the trusts, and for the ends, intents, and purposes hereinafter limited, expressed, and declared of and concerning the same messuages, farms, lands, and hereditaments, (that is to say) *To the use* of the said E. M. and her assigns, for and during the term of her natural life, by way of restoration and confirmation of her estate for life in the same messuages, farms, lands, and hereditaments with the appurtenances, and also of all powers and privileges, if any, annexed or belonging to the same estate for life of the said E. M. *And* from and after the determination of the estate of the said E. M. for her life, and in the mean time subject thereto, and to the said powers and privileges; *To the use* of such person or persons for such estate or estates, &c. *(the usual form to prevent a title of dower)*. And to, for, and upon no other use, trust, intent or purpose whatsoever. *In witness*, &c.

shall enure,

and that person shall stand seised,

As to the lands conveyed,

To the use of the tenant for life, during her life, in confirmation of her estate for life, and of all powers annexed thereto.

Remainder.

To uses to prevent dower.

FORM XII.

Uses for Confirmation of former Assurances.

To the use and intent, to confirm prior deeds;

To THE USE, intent, and purpose to confirm and give effect to the several indentures hereinbefore recited, according to the effect, true intent, and meaning of the same indentures respectively; and

particularly the uses of a marriage settlement.

in particular *To the uses*, upon the trusts, and for the ends, intents and purposes limited, expressed, and declared, of and concerning the same towns, lands, tithes, and hereditaments in and by the said hereinbefore in part recited indenture of release, or marriage settlement, bearing date on or about the 12th day of February, in the year 1811:

Subject to prior estates;

Subject nevertheless to the prior estates, liens, charges, and incumbrances, then affecting the said towns, lands, tithes, and hereditaments respectively;

and giving precedence to a term of years.

Nevertheless, and as it was the intention of the parties to the same indenture of release, so it is hereby declared and agreed by and between the parties to these presents, as far as they respectively are interested, and as far as they respectively lawfully may or can, that the said term of 400 years, limited or created in and by the said last mentioned indenture of release and marriage settlement, shall have precedence of, and take effect prior to the other estates and interests limited or created in and by that indenture.

FORM XIII.

Uses and Provisions for confirming an Annuity, and so as to continue it in Equity though it should be extinguished at Law.

After uses for joint appointment. And in default, &c. Then to the other uses and for the other purposes hereinafter limited and declared, that is to say, *To the use*, intent, and purpose, to restore and confirm the right of the said G. W. and her assigns to have, receive, and take, the said annuity, or yearly rent-charge of £200, out of the said hereby, or hereby intended to be released, or otherwise assured, moiety or half part, of and in the lands and hereditaments hereinbefore mentioned or described, and of and in their and every of their rights, members and appurtenances in common with the other hereditaments which are liable to, or chargeable with, the payment of the same annuity or yearly rent-charge; and to restore and confirm all powers and remedies by distress and entry, and the trusts of all terms of years, which were respectively created for securing and enforcing the payment of the said annuity or yearly rent-charge of £200; to the intent, and so that the same annuity or yearly rent-charge may be payable or paid, recovered or recoverable, in the same or the like manner as if these presents had not been made or executed, or the

To the use and intent to confirm a rent-charge,

and the powers for securing the same.

recovery hereby agreed to be suffered had not been suffered. *And* subject to the payment of the said annuity or yearly rent-charge of £200, and the powers and remedies for recovering and enforcing the payment of the same, *To the use* of the said W. W. his heirs and assigns for ever. And to no other use, and upon no other trust, nor for any other end, intent, or purpose whatsoever. And the said J. W. and W. W. do hereby direct and declare, consent and agree, that nothing contained in these presents, or in the recovery hereby agreed to be suffered, is meant or intended to extinguish the said annuity or yearly rent-charge of £200, or any part thereof, or any of the powers or remedies for recovering or enforcing the payment of the same, or to exonerate any of the lands and hereditaments which, at the time of the execution of these presents, are, or were, charged or chargeable with the payment thereof. *And further*, that, notwithstanding any extinguishment at law of the said annuity or yearly rent-charge, the same shall subsist in equity, in the same or the like manner, and with the same or the like powers and remedies, and charged or chargeable on the same lands and hereditaments; and be raised or raisable under the trusts of the term or terms for years, or other estate or estates created for securing the said annuity or yearly rent-charge, as if the said annuity or yearly rent-charge had not been so extinguished, any law or usage to the contrary in any wise notwithstanding.

And subject thereto,

To the use of W. W. in fee.

AGREEMENT that the present deed and recovery shall not extinguish the rent-charge.

and that the rent-charge shall subsist in equity, though extinguished at law.

FORM XIV.

Limitation of Uses, adapted to the Circumstances of a Recovery suffered by two Persons; one having the Freehold, and the other a remote Estate-tail.

To THE USE of the said M. G. B, and his assigns, for and during the term of his natural life; for the purpose of restoring and confirming, or giving effect to the said estate for life of the said M. G. B, and all powers and privileges annexed to that estate. *And to the use*, intent, and purpose, to confirm and establish all other the uses and estates, which were limited by the hereinbefore in part recited last will and testament of the said M. B, prior to the estate-tail thereby limited to the said W. B. party hereto, and the heirs male of his body lawfully begotten; and also to restore and establish all powers and authorities, which were by virtue of the same last will and testament annexed to such prior uses, or exerciseable in respect thereof, or during the continuance of the same uses and estates, so being prior to the said estate-tail of the said W. B. party hereto. And from and immediately after the determination of the several uses and estates hereinbefore limited and declared, restored or confirmed, and in the mean time subject thereto, and to such powers and privileges as aforesaid, and the estates and interests to be made or limited in pursuance or

To THE USE of M. G. B. for his life, in confirmation of his estate, and all powers annexed thereto.

And to confirm all other estates prior to the estate-tail,

and all powers, &c.

Remainder,

in exercise of all or any of the same powers and authorities; then, *As to* the said farm, lands and hereditaments called B, otherwise Great B.; and also the said farm, lands, and hereditaments called M.; and also as to the said tithes and tenths of the same farms, lands, and hereditaments respectively; and also as to the said farm and lands called M, and hereinbefore described to be in the occupation of the said W. H, with their respective rights, members, and appurtenances, *To the use* of the said V. W. V. and T. S, their executors, administrators, and assigns, for and during the full term or time of 500 years, to be computed from the day of the decease of the said M. G. B.; and thence next ensuing and fully to be complete and ended, without impeachment of or for any manner of waste; nevertheless upon the trusts, and for the ends, intents, and purposes, and subject to the provisoes, declarations and agreements hereinafter expressed and declared of and concerning the same term. *And as to*, for, and concerning all the said manors, messuages, farms, lands, tenements, and hereditaments hereby released, &c. and every part and parcel of the same, with their and every of their rights, members, and appurtenances, other than and except the said farms, land, tithes, and hereditaments, comprised in the said term of 500 years hereby limited or created; *And* from and after the expiration or other sooner determination of the same term, and in the mean time subject thereto, and to the trusts hereby declared thereof, then also *as to*, for, and concerning the farms, lands, tithes, and hereditaments comprised in the said terms of 500 years with their and every

As to part of the lands,

To the use of trustees for 500 years from decease of M. G. B.

And as to the residue of the lands,

and after the term as to the lands comprised therein,

of their rights, members and appurtenances, *To the use* of the said W. B. party hereto, his heirs and assigns for ever. And to, for, and upon no other use, trust, end, intent or purpose whatsoever. AND IT IS HEREBY DECLARED and agreed by and between the parties to these presents, as far as they respectively are interested, that the said farms, lands, tithes, and hereditaments, hereby limited to the use of the said V. W. V. and T. S, their executors, administrators, and assigns, for the said term of 500 years as aforesaid, are so limited to them, *upon trust* that they the said V. W. V. and T. S, or the survivor of them, or the executors or administrators of such survivor, do and shall, as soon as conveniently may be after the decease of the said M. G. B, or in his life-time, either by selling or mortgaging all or any part of the farms, lands, tithes, and hereditaments, comprised in the said term of 500 years, for all or any part of the same term ; or by, with, and out of the rents and profits of the same farms, lands, tithes, and hereditaments ; or by making entries thereon, and taking the rents and profits thereof ; or by all and every or any one or more of the said ways and means, or by any other lawful and reasonable ways and means whatsoever, levy and raise the sum of £10,000, and interest for that sum, from the day of the decease of the said M. G. B. at and after the rate of £5 for £100, by the year, until payment thereof. *And* do and shall stand and be possessed of the same sum of £10,000, and the interest thereof, *Upon trust* for the said M. G. B, his executors, administrators, and assigns, as part of his personal estate. *Pro-*

To the use of W. B. in fee.

DECLARATION that the term of 500 years is limited,

Upon trust to raise 10,000*l.* for M. G. B.

Proviso for

cesser of the term.

vided always, and it is hereby declared and agreed by and between all the parties to these presents, that when and as soon as all the trusts hereinbefore declared of and concerning the said term of 500 years shall in all respects be fully performed and satisfied, and the said V. W. V. and T. S, and each of them, their and each of their executors, administrators and assigns shall be fully reimbursed and satisfied all costs, charges, and expences, if any, to be occasioned by, or relating to the trusts hereby reposed in him and them as aforesaid, the said term of 500 years, as to such and so many and such parts of the said farms, lands, tithes, and hereditaments comprised therein as shall not be sold or mortgaged for the purposes aforesaid, shall cease and be void, to all intents and purposes whatsoever ; and as to such and so many and such parts of the same farms, lands, tithes, and hereditaments as shall have been mortgaged for the purposes aforesaid, the same term shall, subject to such mortgage or mortgages, attend, wait upon, and go along with, the reversion, freehold, and inheritance of the farms, lands, tithes, and hereditaments, to be comprised in the same mortgage or mortgages respectively.

That if the sum is raised in the life-time of M. G. B. he shall keep down the interest during his life.

Provided also, and it is hereby further declared and agreed by and between the parties to these presents, as far as they respectively are interested, that if the said sum of £10,000, or any part of the same, shall be raised in the life-time of the said M. G. B, he the said M. G. B. shall from time to time keep down, discharge, and pay, all the interest which shall accrue or become due in his life-time, for the same sum, or such part or

parts thereof as shall be raised as aforesaid. *Provided also*, and it is hereby further declared and agreed by and between the parties to these presents, as far as they respectively are interested, that no such sale as aforesaid shall be made in the life-time of the said M. G. B. Nor shall any such sale be made at any time after his decease, without one year's notice in writing, requiring the payment of the said sum of £10,000 and the interest thereof; nor until the default shall be made in payment of the same in pursuance of such notice. *And* it is hereby further declared and agreed by and between the said parties to these presents, as far as they respectively are interested, that the costs, charges, and expences of, and attending all and every mortgage or mortgages to be made in the life-time of the said M. G. B, for the purpose of raising the said sum of £10,000 and the interest thereof, shall be borne and defrayed by the said M. G. B, his executors, administrators, or assigns. *Here were added clauses of indemnity to purchasers and mortgagees.*

That no sale shall be made in the life-time of M. G. B.

nor after his death, without a year's notice.

That the charge of any mortgage made in the life-time of M. G. B. shall be borne by him.

FORM XV.

Uses declared of a Recovery, suffered by a Daughter Tenant in Tail in Remainder, for the Time being, whose Estate was liable to be postponed by the Birth of a Son; confirming all prior Estates.

Habendum to A. B. for the joint lives of himself and the daughter.

To HAVE AND TO HOLD the said manor, &c. and all and singular other the premises, hereby released, &c. and every part and parcel of the same, with their and every of their rights, royalties, members, and appurtenances, unto and to the use of the said A. B. and his assigns, during the joint natural lives of the said A. B. and F. E. B. To THE INTENT that the said A. B. may be tenant, &c. [*Common recovery clause.*] To ENURE, &c. *To the use*, intent, and purpose, to restore, confirm, and give effect to the said estate for the life of the said R. H. B, and all powers and privileges annexed to that estate, *And* to the further use, intent and purpose, to confirm and establish all the other uses and estates, except the estate-tail of the said F. E. B, which were respectively limited by the said hereinbefore in part recited indentures of lease and release, prior to the ultimate remainder in fee limited to the said R. B. and to his heirs, *And also* to restore and confirm all powers and authorities, which, by virtue of the same indentures, are annexed to such prior uses and estates, or are exerciseable in

To make him tenant to the præcipe, &c.

Declaration that the recovery shall enure,

To confirm the estate of a tenant for life, and the powers annexed thereto;

and all other estates, prior to the remainder in fee, except the estate-tail;

and the powers annexed to the same estates.

respect, or during the continuance of the uses and estates, so being prior to the said ultimate remainder in fee to the said R. B. *And* subject to the estates and interests so confirmed or restored as aforesaid, and also subject to such powers and authorities as aforesaid, the said manor, messuages, &c. with their and every of their rights, royalties, members, and appurtenances, shall, (in lieu of the said estate-tail of the said F. E. B, and the remainders and reversions expectant on that estate, and as a substitution for the same estate-tail, remainders, and reversions,) remain and be *To the use* of such person or persons, for such estate or estates, and for such interest or interests, by way of annuity, rent-charge, or otherwise, and in such parts, shares, and proportions, and upon such trusts, and for such ends, intents, and purposes, and charged and chargeable in such manner, and either absolutely or conditionally, and subject to such powers of revocation, and of new appointment, and other powers, provisoes, conditions, restrictions, limitations, declarations, and agreements, as the said F. E. B. at any time or times, and from time to time, after the death of the said R. H. B. and A. his wife, and of the survivor of them; or in the life-time of the said R. H. B. with his consent in writing; or after the death of the said R. H. B. and in the life-time of the said A. B, with her consent in writing; by any deed or deeds, to be sealed and delivered by her in the presence of one, two, or more credible witness or witnesses, shall direct, limit, or appoint. *And* in default of such direction, limitation, and appointment; and in the mean time,

And subject thereto,

To the use of such person, &c.

as the daughter,

(after the decease of R. H. B, and A. his wife, or in his or her life-time, with his or her consent,) shall by deed appoint

In default of appointment,

and from time to time, until the same shall take effect; and from time to time, subject to such uses, estates, trusts, charges, and interests, as shall have been so directed, limited, or appointed, by the said F. E. B, then *To the use* of the said F. E. B. and the heirs of her body lawfully to be begotten. *And* in default of such issue, *To the use* of the survivor of them, the said R. H. B, and A. B. his wife, and the said F. E. B, his or her heirs and assigns for ever. PROVIDED ALWAYS, and notwithstanding any thing hereinbefore contained, and also notwithstanding the said recovery to be suffered as aforesaid, the right of the said F. E. B. to her portion, to be raised under the trusts of the said term of 500 years, shall remain in full force, against any son or sons, or other issue male, of the said marriage. But the same portion shall be, and shall be considered as extinguished against all persons who, for the time being, shall be intitled to the said manor and other hereditaments under the settlement hereby made thereof. But the same portion, if once payable, and actually paid, shall not be liable to be refunded. Nor shall the stipulations or declarations hereinbefore contained preclude the said F. E. B, her executors, administrators, or assigns, from the right of having the said portion raised at any time after the birth, and during the continuance of issue male, in the same manner as the same might have been raised in case no recovery had been suffered, or in case these presents had not been executed. *In witness*, &c.

To the use of the daughter in tail.

Remainder, To the use of the survivor of the daughter and R. H. B. and A. his wife, in fee.

Proviso that, as against issue male of the marriage, the daughter shall remain entitled to her portion under the trusts of a term.

But the same shall be extinguished as against persons claiming under the present settlement.

FORM XVI.

Uses of a Recovery, suffered by a Person having the Freehold and a remote Estate Tail; confirming prior Estates, and after giving the former Tenant in Tail a Power of appointment, again limiting the Lands to him in tail, and restoring the subsequent Estates.

To THE USE, intent, and purpose, to restore and give effect to the said estate for the life of the said R. Lord C, and all powers and privileges annexed to that estate, and *To the use*, intent, and purpose, to confirm and establish all the other uses and estates, which were limited by the said hereinbefore in part recited indentures of lease and release, prior to the estate-tail thereby limited to the use of the said R. Lord C, or to the use of the heirs of his body lawfully to be begotten; and also to restore and confirm all powers and authorities which, under and by virtue of the same indentures, are annexed to such prior uses, or exercisable in respect thereof, or during the continuance of the same uses and estates, so being prior to the said estate-tail of the said R, Lord C. *And* from and after the determination of the several uses and estates, hereinbefore limited and declared, restored or confirmed, and in the mean time subject thereto, and to such powers and privileges as aforesaid, *To the use* of, &c. [*giving a general power of appointment.*] *And* in default of such

To THE USE and intent to restore the estate for life of Lord C. and all powers annexed thereto: and all other estates prior to the estates-tail;

and all powers, &c.

And subject thereto,

To such uses as Lord C. shall appoint.

In default of appointment.

direction, limitation, and appointment; and in the mean time, and until such direction, limitation, and appointment shall be made and take effect; and from time to time subject to such estates and interests as shall have been directed, limited, or appointed by the said R, Lord C, under, or by virtue of, and pursuant to his power hereinbefore contained; then *To the use* of the said R, Lord C. and the heirs of his body lawfully issuing. *And* from and after the determination of that estate, and in the mean time subject thereto; *To such uses*, upon such trusts, and for such intents and purposes, and under and subject to such powers, provisoes, limitations, declarations, and agreements, as by the said hereinbefore in part recited indentures were limited, expressed, and declared, of, and concerning the said manors, lordships, rectories, advowsons, messuages, lands, tenements, tithes, parts, shares, and hereditaments by way of remainder after, and expectant on, the estate-tail thereby limited to the use of the said R. Lord C, or as annexed or collateral thereto, or to such and so many of the same uses, trusts, intents, and purposes, powers, provisoes, limitations, declarations, and agreements, as are now subsisting, and capable of taking effect; or as near thereto as the deaths of parties, the change of interests, or other intervening circumstances will admit. And to no other use, and upon no other trust, nor for any other end, intent, or purpose, whatsoever.

To the use of Lord C. in tail.

Remainder, To the former uses, limited subsequently to the estate-tail.

FORM XVII.

Deed on substituting another Person as Demandant in the Place of the intended Demandant who died before the Recovery was suffered. (a)

THIS INDENTURE, &c. BETWEEN, &c. [*the surviving parties to the deed making tenant to the præcipe, and the new demandant. Recite that deed shortly; and the death of the intended demandant.*] AND WHEREAS no recovery hath been yet suffered of the manors, &c. and on that account it is become necessary that in the recovery to be suffered of those manors, &c. some person should be named as a demandant in the place or stead of the said [*intended demandant,*] and it is intended to name the said as such demandant. NOW THIS INDENTURE WITNESSETH, and it hereby granted, declared, and agreed, by and between all the parties to these presents, that all and every recovery and recoveries, suffered, or to be suffered, either under or by virtue, or means, or in consequence of the said hereinbefore mentioned indenture of bargain and sale, and in which the said is or shall be named a

(a) See the Text, p. 29.

demandant instead of the said shall have the same or the like force, effect, and operation in law to all intents and purposes, and shall enure to the same or the like uses, intents and purposes, in all respects, as if the name of the said had been inserted in the said indenture of bargain and sale, in the place or stead of the name of the said as far as the said is or shall be named a demandant, in the place or stead of the said in any recovery or recoveries suffered, or to be suffered, as aforesaid, any thing in the same indenture contained to the contrary thereof in any wise notwithstanding. *In witness*, &c.

FORM XVIII.

Demise to protect against Forfeiture, on suffering a Common Recovery.

THIS INDENTURE of four parts, made, &c. 1800: BETWEEN T. H. of, &c. and J. H. of, &c. of the first part; D. L. of, &c. and A. his wife, of the second part; L. R. of, &c. and M. his wife of the third part; and A. B. of, &c. of the fourth part. WHEREAS the said D. L. and A. his wife, and L. R. and M. his wife, have agreed to suffer a common recovery of the messuages, farms, lands, tenements, and hereditaments hereinafter described, and also bargained and sold, or otherwise assured, or intended so to be: and the uses of the same recovery are to be declared by an indenture of seven parts, already prepared, and dated or to be dated on the day of now instant, and made or intended to be made between the said T. H. and J. H. of the first part; the said D. L. and A. his wife of the second part; the said L. R. and M. his wife of the third part; the Rev. J. J. of, &c. clerk, of the fourth part: T. J. of, &c. gent. and the Rev. H. R. of, &c. clerk, of the fifth part: E. B. of, &c. gent. of, the sixth

PARTIES.

Recital of agreement to suffer a recovery.

Reference to the deed declaring the uses of the intended recovery.

part; and of the seventh part, and to be executed after the execution of these presents; and the said T. H. and J. H. who are trustees for the said A. L. are to join in making a tenant to the writ of entry on which the said recovery is to be suffered. And whereas it is deemed expedient that a bargain and sale, or demise for years, should be made of the said messuages, farms, lands, tenements, and hereditaments, for the purpose of protecting the persons beneficially intitled to the same messuages, farms, lands, tenements, and hereditaments, from any claim on the ground that a forfeiture may or shall be committed by means of such recovery, as to such of them the said T. H, J. H, D. L. and A. his wife, and L. R. and M. his wife, as are or may be deemed to be mere tenants for life. Now this indenture witnesseth, that for affording protection against any such claim of forfeiture, and in consideration of ten shillings of lawful money, &c. to each of them the said T. H, J H, D. L. and A. his wife, and L. R. and M. his wife, well and truly paid by the said A. B. immediately before the execution of these presents, (the receipt whereof is hereby acknowledged,) The said T. H. and J. H, (on the nomination, and at the instance and request, and by the direction and appointment, of the said D. L. and A. his wife, and L. R. and M. his wife, testified by their severally executing these presents,) And also the said D. L. and A. his wife, and L. R. and M. his wife, *have*, and each and every of them *hath*, granted, bargained, sold, and demised, and by these presents *do*, and each and every of them *doth*, grant, bar-

That it is expedient to make a demise for years, to protect against any claim for forfeiture.

Witnesseth that for affording protection against such claim for forfeiture, and for nominal consideration,

The trustees, (on nomination of the owners,)

and also the owners,

grant, &c. to a trustee,

gain, sell, and demise, to the said A. B, his executors, administrators, and assigns ALL, &c. [*parcels as in release*], *And* the reversion and reversions, remainder and remainders, yearly and other rents of the said messuages, farms, lands, tenements, and hereditaments, hereby bargained, sold and demised, or intended so to be, and every part and parcel of the same, with their, and every of their rights, members, and appurtenances, and all rent charges payable thereout or charged thereupon. PARCELS. Reversion, &c.

TO HAVE AND TO HOLD the said messuages, farms, lands, tenements, rent-charges, hereditaments, and all and singular other the premises hereby bargained, sold, and demised, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances, unto the said A. B, his executors, administrators, and assigns, from the day next before the day of the date of these presents for and during the term or time of one hundred years, thence next ensuing, and fully to be complete and ended, if the estates and interests of the said A. L, L. R. and M. his wife, or any or either of them in the same premises respectively, shall so long continue: *Nevertheless* only by way of protection against any forfeiture, to be claimed by reason or means of any recovery or recoveries to be suffered as aforesaid, and for that purpose to be held from time to time *In trust* for the person or persons who for the time being, and from time to time shall be entitled to the said messuages, farms, lands, tenements, and hereditaments, according to the uses, trusts, ends, intents, and purposes, powers, provisoes, declarations, and agreements, contained, or to be contained in the

HABENDUM to a trustee for 100 years.

if the estate of the owners shall so long continue,

by way of protection against forfeiture,

and in trust for persons entitled under the uses declared of the recovery.

said indenture dated or to be dated on the day of now instant, and to be thereby declared of the same messuages, farms, lands, tenements, and hereditaments; without any prejudice or eviction, at law or in equity, by reason or on account of any forfeiture which can, shall, or may be claimed by reason of the recovery or recoveries agreed to be suffered as aforesaid. And upon no other trust, and for no other end, intent, or purpose whatsoever. *In witness*, &c.

FORM XIX.

Another Demise of divers Messuages, &c. previous to suffering a Recovery, for the Purpose of protecting against Forfeiture.

THIS INDENTURE made, &c. 1806. BETWEEN J. T. of, &c. of the one part; and A. B. of, &c. of the other part. WHEREAS the said J. T. is desirous of suffering a common recovery of the messuages, lands, tenements, and hereditaments hereinafter described, and also bargained and sold, or demised, or otherwise assured, or intended so to be; and it is deemed advisable or expedient, that a bargain and sale, or demise for years, should be made of the same messuages, &c. for the purpose of protecting the said J. T. and his assigns, from any claim on the ground that a forfeiture may or shall be committed by the said J. T. by means of the recovery or recoveries intended to be suffered by him, and on account of his being considered as tenant for life only of the same hereditaments. NOW THIS INDENTURE WITNESSETH that for affording protection against any such forfeiture, and in consideration of ten shillings of lawful money, &c. to the said J. T. well and truly paid by the said A. B. immediately before the execution of these presents, (the receipt whereof is hereby acknowledged,) The said J. T. *hath* granted, bargained, sold, and demised, and by

PARTIES.

RECITAL of desire to suffer a recovery,

and that it is expedient to make a demise for years to protect against any claim for forfeiture.

WITNESSETH that for affording protection against such forfeiture, and for nominal consideration,

the owner grants, &c to A. B.

these presents *doth* grant, bargain, sell, and demise, unto the said A. B, his executors, administrators, and assigns. ALL the messuages, lands, tenements, and hereditaments, situate, standing, lying, and being in the several parishes of W, W, T, and D. in the counties of S. and W, or elsewhere within this realm, which by the last will and testament of R. T. of W. in the county of S. gentleman, deceased, were given and devised unto C. N. the elder, of W. aforesaid, T. W. of H. in the parish of S, in the county of S. or W. or one of them, yeoman, R. T. of B. in the county of W. toy-maker, and R. W. of W. in the said county of S, and to the survivors and survivor of them, and the heirs, executors, and administrators of such survivor, in trust, and for such uses, ends, intents, and purposes, as are in the said will expressed and declared, and every part and parcel of the same. Which said will bears date on or about the 3d day of September, in the year 1781, and was duly proved in the court of on or about the day of *And all* houses, &c. [*general words*]. *And* the reversion, &c. [*as in other deeds*], TO HAVE AND TO HOLD the said messuages, lands, tenements, and hereditaments, and all and singular other the premises hereby bargained, sold, and demised, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances, unto the said A. B, his executors, administrators, and assigns, from the day next before the day of the date of these presents, for and during the term or time of one hundred years thence next ensuing,

ALL the messuages, &c. devised by a will referred to.

HABENDUM to A. B. for 100 years, if the grantor shall so long live,

and fully to be complete and ended, if the said J. T. shall so long live: *Nevertheless* only by way of protection against any forfeiture to be claimed by reason or means of any recovery or recoveries to be suffered by the said J. T.; and for that purpose to be held, *In trust* for the said J. T. and his assigns, without any prejudice or eviction, by reason or on account of any forfeiture which can, shall, or may be claimed, by reason of any recovery or recoveries to be suffered of the same messuages, lands, tenements, and hereditaments, by the said J. T. And upon no other trust, nor for any other end, intent, or purpose whatsoever. *In witness*, &c.

by way of protection against forfeiture,

and in trust for the grantor,

FORM XX.

Habendum creating Uses for a Term to protect against Forfeiture; Remainder to a Tenant for suffering a Recovery.

HABENDUM to S. A. his heirs and assigns. To the use of A. B. for 100 years, if the grantor shall so long live.

TO HAVE AND TO HOLD the said messuages, &c. unto the said S. A. his heirs and assigns, *To the uses*, &c. that is to say, *To the use* of the said A. B. his executors, administrators, and assigns, from the day next before the day of the date of these presents, for and during the term or time of 100 years, thence next ensuing, and fully to be complete and ended, if the said C. A. shall so long live. *Nevertheless in trust* only for the benefit of the person or persons, who, for the time being, shall by virtue of the uses hereinafter declared, be seised of, or intitled to, the reversion or remainder of the same moiety of the same messuages and hereditaments, expectant on the determination of the said term of 100 years. *And* from and after the expiration or other sooner determination of the said term of 100 years, determinable as aforesaid, and in the mean time subject thereto, and to the trusts of the same term, *To the use* of the said S. A. his heirs and assigns, TO THE INTENT, &c.

In trust for the persons entitled under the uses after declared.

Remainder,

To the use of S. A. his heirs and assigns, to make him tenant to the præcipe, &c.

FORM XXI.

Demise for a Term, to operate by Estoppel, and in trust to attend the Inheritance; and Covenant to levy a Fine Sur Concesserunt, in Confirmation of the Term, and to suffer a Common Recovery.

THIS INDENTURE of three parts made the day of in the 47th year, &c. 1807. BETWEEN W. B. of, &c. R. B. of, &c. H. B. of, &c. and M. B. of, &c. of the first part; I. C. of &c. of the second part; and J. B. of, &c. of the third part. WITNESSETH that in pursuance and performance of an agreement in this behalf; and for the purpose of binding all present and future estates and interests, which the said W. B, R. B, H. B, and M. B, respectively, or any of them, have in the hereby, or hereby intended to be, demised moiety, of and in the messuages, lands, and hereditaments, hereinafter described; and in consideration of 10*s.* of lawful money, current in Great Britain, to the said W. B, R. B, H. B, and M. B, well and truly paid by the said J. P, immediately before the execution of these presents, (The receipt whereof is hereby acknowledged.) They the said W. B, R. B, H. B, and M. B, (on the nomination, at the request, and by the direction and appointment of the said J. C, testified by his executing these presents) have, and each and every of them hath granted, bargained, sold, demised, and to farm

PARTIES.

WITNESSETH that for binding all present and future estates of the vendors,

and for nominal consideration,

The vendors (by direction of the purchaser)

grant, &c. to J. P.

letten, And by these presents do, and each and every of them doth, grant, bargain, sell, demise, and to farm let unto the said J. P, his executors, administrators, and assigns, ALL that undivided moiety, or equal half part, (the whole into two equal parts to be divided,) of them the said W. B, R. B, H. B, and M. B. the younger, or of M. B. their mother, or of some or one of them, of and in *all*, &c. [*Parcels*] *And* also of and in all houses, &c. TO HAVE AND TO HOLD the said hereby, or hereby intended to be demised moiety, of and in the said messuage, lands, and hereditaments hereinbefore described, and every part and parcel of the same, and of and in their and every of their rights, members, and appurtenances, unto the said J. P, his executors, administrators, and assigns, from the day next before the day of the date of these presents, for and during the term or time of 1000 years, thence next ensuing, and fully to be complete and ended, without impeachment of or for any manner of waste; *Upon the trusts*, nevertheless, and for the ends, intents, and purposes, hereinafter mentioned, expressed, and declared, of and concerning the same. YIELDING AND PAYING for the said demised premises, yearly and every year during the said term, the rent of a peppercorn, if the same rent shall be lawfully demanded. AND IT IS HEREBY DIRECTED, declared, and agreed, by and between the parties to these presents, as far as they respectively are interested, that the said term of 1000 years, hereby demised to the said J. P, his executors, administrators, and assigns, is so demised to him and them, *In trust* for the said J. C, his heirs and assigns, and to

PARCELS.

HABENDUM to J. P. for 1000 years, *Sans waste*.

At a peppercorn rent.

DECLARATION that the term is limited.

In trust for the purchaser

attend the inheritance of the said moiety of and in the said messuage, lands, and hereditaments, hereinbefore described, as the same moiety hath been conveyed and assured, or is contracted, and agreed to be conveyed and assured, by the said W. B, R. B, H. B, and M. B. and the said M. B. their mother, to the use of the said J. C, his heirs, appointees and assigns. And each and every of them, the said W. B, R. B, H. B, and M. B, party hereto, severally, separate, and apart from the others of them, doth hereby, for himself and herself respectively, and his and her respective heirs, executors, and administrators, and as to and concerning only the acts, deeds, and defaults of himself and herself respectively, and his and her respective heirs, covenant and agree with the said J. C. his heirs and assigns, in manner following, that is to say, *That* they, the said W. B, R. B, H. B, and M. B, party hereto, or their heirs, shall and will, at their own proper costs, and charges, in or as of Trinity term now last past, or before the end of Michaelmas term now next ensuing, acknowledge and levy unto the said J. P, his executors, administrators, and assigns, before his majesty's justices of the court of Common Pleas at Westminster, one or more fines or fines *Sur Concesserunt*, with proclamations to be thereupon had and made, according to the form of the statutes in that case made and provided, and the usual course of fines in such cases used, of the said hereby, or hereby intended to be demised, or otherwise assured, moiety, of and in the messuage, lands, and hereditaments, hereinbefore described, with the appurtenances, and thereby grant the same

his heirs and assigns, to attend the inheritance as conveyed to him by the vendors.

Covenant by the vendors, severally.

To levy a fine sur concesserunt for 1000 years, in confirmation of the present demise.

moiety of and in the same messuage, lands, and hereditaments, for a term of 1000 years, to commence and be computed from the day next before the day of the date of these presents, To the intent that the same fine may be a confirmation of these presents, and of the term hereby granted, or intended so to be. *And also* that they, the said W. B, R. B, H. B, and M. B, party hereto, or their heirs, when thereunto requested by the said J. C, his heirs, appointees, or assigns, and with his or their concurrence, as far as such concurrence shall be necessary, shall or will suffer, or cause to be suffered, a common recovery, or common recoveries, of the hereby, or hereby intended to be, demised moiety, of and in the messuage, lands, and hereditaments, hereinbefore described; and by the same common recovery or common recoveries, and by a deed declaring the uses thereof, shall and will convey, settle, and assure, the same moiety of and in the same messuage, lands, and hereditaments, to the use of the said J. C, his heirs, appointees or assigns, or to such uses, upon such trusts, and for such ends, intents, and purposes, as he or they shall direct or appoint, free and clear from all charges and incumbrances, to be in the mean time committed or suffered by the said W. B, R. B, H. B, and M. B. party hereto, or any or either of them, or their, or any or either of their, heirs, or by any person or persons whomsoever, claiming or to claim by, through, from, under, or in trust for them, or any or either of them, other than and except the said term of 1000 years, and the fine to be levied in confirmation thereof. *In witness*, &c.

And to suffer a recovery on request.

FORM XXII.

The £100,000 *Clause; being a Clause in a* Recovery Deed *to cease the Estate limited by a Tenant for Life, for the Purpose of assisting a Tenant in Tail in suffering a Recovery.*

The Object of this Clause is in most cases to prevent a Merger of the Estate for Life in the Ownership under the Estate Tail: and to revive the Estate for Life, and all Powers annexed thereto (*a*). *This object is in most cases better attained by the Limitation of an Estate for the joint Lives.*

PROVIDED ALWAYS, and these presents are upon this express condition, that if the said his executors, or administrators, shall not, on the day of well and truly pay, or cause to be paid, to the said or her assigns, the full sum of £100,000 of lawful money of the united kingdom of Great Britain and Ireland, current in Great Britain; then the grant, bargain, and sale, or other assurance, hereby made to the said and his heirs, during the life of the said [*or* "during the joint lives of the said and "] shall cease and be void to all intents and purposes, so that the estate of the said may be discharged of and from the limitation hereby made for the life [*or* "joint lives"] of the said —.

(*a*) See the Text. p. 109.

FORM XXIII.

GENERAL FORM OF CLAUSE.

Declaratory of the Intention and Agreement to suffer a common Recovery, and declare the Uses thereof with some of the more ordinary Variations. For other variations, see the appropriate Forms.

To the intent that the grantee may be tenant to the præcipe for suffering a common recovery.

TO THE INTENT that the said may be tenant of the freehold of the said hereby released or otherwise assured, or intended so to be, and every part and parcel of the same, with their rights, members, and appurtenances, *to the end*, that one or more good and perfect common recovery or recoveries, with double voucher, may be had and suffered of the same hereditaments. *And* for that purpose, it is hereby directed, declared, and agreed, by and between all the said parties to these presents, as far as they respectively are interested, that the said shall permit and suffer the said or some other person or persons, at the costs and charge in all things of the said his heirs, executors, or administrators, at any time or times hereafter to sue forth and prosecute against him, the said

Mode of suffering the recovery prescribed.

(*a*) out of his majesty's high court of Chancery (*b*) one or more writ or writs of entry *sur disseisin en le post*, returnable before his majesty's justices of the court of Common Pleas, at Westminster; and thereby demand of the said the and premises hereby released, or otherwise assured, or intended so to be, with their, and every of their rights, members, and appurtenances (*c*), by the names and descriptions of or by such other apt, good, sufficient, and proper names, number of messuages, and acres, quantities, qualities, and other descriptions, as shall be[483] deemed necessary, proper, sufficient, and requisite to comprise the same (*d*). *And* that the said

(*a*) *When the lands are in any of the Welsh counties.*] One or more writ or writs of *quod ei deforceat*, in the nature of a writ or writ of entry *sur disseisin en le post*, and to be returnable before his majesty's justice or justices for the said county of —.

When the lands are in the county palatine of Chester.] Out of his majesty's court of Exchequer at Chester, one or more writ or writs of entry, *sur disseisin en le post*, returnable before his majesty's justice or justices of Chester.

When the lands are in the county palatine of Durham.] Out of the court of chancery at Durham, one or more writ or writs of entry, *sur disseisin en le post*, returnable before the justices of the court of Pleas, at Durham.

When the lands are in the county palatine of Lancaster.] Out of his majesty's court of Chancery for the county palatine of Lancaster, one or more writ or writs of entry, *sur disseisin en le post*, returnable before his majesty's justices of Assize for the same county palatine.

(*b*) *When the lands lie in two or more counties.*] Two or more writs, &c.; and by one of the said writs demand of the said the said situate in the said county of by the names and descriptions of ; and by the other of the said writs demand of the said , the said situate in the said county of , by the names and descriptions of —.

(*c*) Sometimes the description is omitted.

(*d*) *As to lands in Wales.*] And shall make protestation to pursue the said writ or writs in the nature of a writ or writs of entry, *sur desseisin en le post* at the common law, according to the statute in that behalf.

shall in his own person, or by his attorney or attornies, lawfully authorised in that behalf, appear to the same writ or writs, and (*e*) vouch to warranty the said *And* that the said shall in his own person or by his attorney or attornies, lawfully authorised in that behalf, appear gratis, and freely enter into the warranty of the said ; and taking the same upon himself, vouch over to warranty the common vouchee of the said court of (*f*) Common Pleas for the time being; who shall appear gratis, and freely enter into the warranty of the said and after imparlance make default. So that judgment may be
[484] given upon the said writ or writs, and every of them, or the said or other demandant or demandants, to recover all and singular the said hereby released, or otherwise assured, or intended so to be, and every part and parcel of the same, with their and every of their rights, members, and appurtenances, by such names, quantities, qualities, and other descriptions as aforesaid, (*g*) against the said ; and for the said

(*e*) *When the Recovery is to be with treble voucher, the form may be to this effect.*] Vouch to warranty the said [*first vouchee.*] And he shall, in his own person, or by his attorney or attornies lawfully authorised in that behalf, appear gratis, and freely enter into the warranty of the said [*tenant*]; and taking the same on himself, vouch to warranty the said [*second vouchee*]. And the said [*second vouchee*] shall, in his own person, or by his attorney or attornies lawfully authorised in that behalf, appear gratis, and freely enter into the warranty of the said [*first vouchee*]; and taking the same on himself vouch over to warranty the common vouchee, &c.

(*f*) Great session, *or* Pleas, *or* of the said county palatine.

(*g*) *When with treble voucher.*] Against the said [*tenant*]; and for the said [*tenant*] to recover in value against the said [*first vouchee*]; and for

to recover in value against the said and for the said to recover in value against the common vouchee as is usual in such cases. And that upon all and every recovery and recoveries to be suffered as aforesaid, execution may be sued and prosecuted by, and seisin had, taken, and delivered unto the said or other demandant or demandants, accordingly. *And* that every other act or thing needful, requisite, or proper, to be done or executed for the purpose of suffering and perfecting a common recovery or recoveries of the said hereby released or otherwise assured or intended so to be, with double, treble, or other voucher to dock the estate-tail of the said of and in the same and all reversions and remainders over and expectant upon the same estate-tail (*h*) may be made, done, and executed. *And* by way of direction and declaration, and not of covenant, it is hereby granted, declared, and agreed, by and between the said parties to these presents, as far as they respectively are interested, and they hereby for themselves severally and respectively, and for their several and respective heirs, executors, and administrators, consent and agree according to their respective estates, rights, and interests in the premises, that the recovery (*i*) hereby agreed to be suffered shall be suffered and

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Direction that recovery shall be suffered.

the said [*first vouchee*] to recover in value against the said [*second vouchee*]; and for the said [*second vouchee*] to recover in value against the common vouchee, &c.

(*h*) *When parties join to extinguish dower or convey.*] And to extinguish the dower, right or title of dower, of the said and to pass the several estates of the said and his wife of and in, &c.

(*i*) *Or* recoveries.

and that parties will give effect thereto.

perfected with all possible dispatch; and that they respectively and their respective heirs on their respective parts will use their utmost endeavours to give effect to the same recovery (*i*) and also to these presents, and the grant, release, confirmation or other assurance hereby made. AND IT IS HEREBY FURTHER DIRECTED, declared, and agreed, by and between all the parties to these presents as far as they respectively have any right, title, or interest in the premises, that immediately upon and after judment obtained, and seisin had and taken upon such recovery or recoveries as aforesaid, the recovery or recoveries so as aforesaid, or in any other manner, or at any other time or times to be suffered: and also the bargain and sale for a year, bearing date on the day next before the day of the date of these presents: and also these presents, and the assurance hereby made; and all and every other fine and fines, recovery and recoveries, and other assurances whatsoever at any time or times heretofore, and to be at any time, and from time to time hereafter, had, made, done, levied, suffered, executed, and perfected, of or concerning all or any part of the said hereby released, or otherwise assured, or intended so to be, either by themselves solely and alone, or jointly and together with any other lands, tenements, or hereditaments (*k*), by or between all and every or any or either of the persons who are parties to these presents, or to which they, or any or either of them is, are, or shall, or may be

DECLARATION that after judgment obtained,

the recovery,

the lease for a year,

the present deed,

and all other fines, &c.

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(*i*) *Or* recoveries.

(*k*) *When an undivided share.*] Or jointly and together with any other part of the same.

parties or privies, or a party or privy, shall, as to all the said parties to these presents respectively, so far as they respectively can lawfully, or rightfully direct the uses of the same fine and fines, common recovery and recoveries, and other assurances, be and enure, and be adjudged, expounded, deemed, decreed, and taken to be and enure, and that the same was and were meant and intended, and is and are hereby directed and declared to be and enure; and also that the person or persons to whom the said fine or fines, common recovery or recoveries, and other assurances respectively have or hath been, or shall or may be levied, suffered, made, and executed, shall stand and be seised, (*l*) *As to*, for, and concerning the said hereby released, or otherwise assured, or intended so to be, and every part and parcel of the same with the appurtenances, *To the use*, &c.

shall enure;

And that the recoverors, &c. shall stand seised.

As to the lands conveyed,

To uses, &c.

(*l*) This clause of qualification should never be omitted.

XXIV.

A more concise Form of a Declaration and Agreement to suffer a Common Recovery.

TO THE INTENT that the said may be tenant of the freehold of the said hereby released or otherwise assured or intended so to be, with the appurtenances, *to the end* that one or more common recovery or recoveries with double voucher may forthwith, and at the costs and charges of the said be had and suffered of the same premises, by the names and descriptions of upon a writ or writs of entry *sur disseisin en le post*, in which the said shall be demandant against the said , who shall vouch to warranty the said , who shall vouch the common vouchee, as is usual in such cases. So that judgment may be given for the said to recover the said hereby released, or otherwise assured, or intended so to be, against the said ; and for the said to recover in value against the said ; and for the said to recover in value against the common vouchee. And so that execution may be awarded, and seisin taken, upon the recovery or recoveries to be suffered as aforesaid, according to the usual form of common recoveries used in like cases.

FORM XXV.

Short Declaration of Uses.

AND it is hereby directed, declared, and agreed, by and between the parties to these presents, as far as they respectively are interested, that after the recovery or recoveries hereby agreed to be suffered, shall be suffered, as aforesaid, or in any other manner, the same recovery or recoveries, and all fines levied and to be levied, and recoveries suffered, and to be suffered, of the said hereinbefore mentioned and intended to be hereby released, or any of them, either alone or jointly with any other lands and hereditaments, shall, *as to*, and concerning the hereinbefore released with the appurtenances, operate, and enure, *To the use* of the said her heirs and assigns for ever.

FORM XXVI.

Mode of framing a Recovery Deed when the Uses of the Recovery are declared in that part which contains the Conveyance of the Estate.

The object of this form was to vest the legal estate in the owner, during the interval between the date of the recovery deed, and the time of suffering the recovery. Consequently all mortgages, &c. before the recovery will operate on the legal estate.

Habendum to the grantee in fee.

To the use of C. D. for joint lives.

Remainder.

To the usual uses for preventing dower.

Declaration that the estate is limited to the use of C. D. to make him tenant to the *præcipe* for suffering a recovery.

To HOLD, &c. unto the said Sir J. R. and his heirs. *To the uses*, &c. (*i. e.*) *To the use* of the said C. D. and his assigns, for and during the joint natural lives of the said Sir J. R. and C. D.; and for the purposes and to the intent, only, hereinafter expressed and declared of and concerning the estate hereby limited to the use of the said C. D. and his assigns. *And* from and after the determination of the estate hereinbefore limited to the use of the said C. D. and his assigns for the joint natural lives of the said Sir J. R. and C. D, and in the mean time subject and without prejudice to the same estate for life, *To the use*, &c. [*of Sir J. R.'s appointment, &c. and to prevent dower, in the usual form.*] AND IT IS HEREBY DECLARED and agreed by and between the said parties to these presents, as far as they respectively are interested, that the said C. D. and his assigns, shall stand and be seised of the said messuage, &c. hereinbefore limited to the use of the said C. D. and his assigns for the joint natural lives of

the said Sir J. R. and C. D, To THE INTENT, &c. [*common form of Recovery Clause.*] The declaration of uses is—*To the uses*, upon the trusts, and for the ends, intents, and purposes, hereinbefore limited, expressed, and declared, of and concerning the same; save and except the estate hereinbefore limited to the use of the said C. D. and his assigns for the joint natural lives of the said Sir J. R. and C. D, it being intended that the same estate shall cease and be extinguished as soon as the recovery hereby agreed to be suffered shall have been suffered; and in all other respects in confirmation of these presents, and for the purpose of giving more full and complete effect to the same.

The recovery declared to enure.
To the uses before limited,
excepting the limitation to the use of C. D.

FORM XXVII. [491]

Another Form of declaring the Uses of the Recovery, by reference to that part of the Deed which contains the Conveyance of the Estate.

TO, FOR, AND UPON THE USES, trusts, terms, ends, intents, and purposes, and subject to the several provisoes, declarations, and agreements, hereinbefore limited, expressed, and declared, concerning the same, and the respective parts and shares thereof, after and expectant on the estate hereby limited to the use of the said and his assigns for the joint lives of the said and , being an estate which is to cease and be extinguished after the recovery or recoveries hereby agreed to be suffered shall be suffered.

To the uses before limited, subsequent to the estate for the joint lives.

FORM XXVIII.

Covenant to suffer a Common Recovery.

AND also that in the first term which shall happen next after the death of the said or in her life-time, if the concurrence of the said or her assigns can be obtained thereto, he the said or his heirs in tail, shall or will, at his or their own costs and charges make, do, and execute, consent to, and concur in all such acts, deeds, proceedings, and assurances, as shall be necessary and proper for suffering a good, valid, and effectual common recovery of the said hereby granted and demised, or otherwise assured or intended so to be, so as to bar the said estate-tail of the said and the reversion in fee-simple, expectant thereon; and enlarge the same estate-tail into an estate in fee-simple; and also for declaring that the same recovery when suffered, shall, as to the hereby granted and demised, or intended so to be, operate and enure *To the use* of the said his executors, administrators, and assigns, for all the residue of the said term of 500 years which shall be then to come and unexpired; in confirmation of, and for the purpose of giving more full and complete effect to, these presents, and the term hereby granted, subject nevertheless to the proviso or agreement for redemp-

tion, hereinbefore contained. *And it is* hereby further directed, declared, and agreed, by and between the parties to these presents, that all fines levied, and to be levied, and all recoveries suffered and to be suffered, and all other assurances, made and to be made of the said hereby granted, or demised, or intended so to be, either alone, or with other lands and hereditaments, shall, *as to* the said hereby granted and demised, or intended so to be, operate and enure *To the use* of the said his executors, administrators, and assigns, for the said term of 500 years, or the then residue thereof, according to the true intent and meaning of these presents, in confirmation of, and for the purpose of giving effect to the same term, subject nevertheless to the proviso or agreement for redemption hereinbefore contained.

FORM XXIX.

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Desire of the Tenant of a remote Estate-Tail to suffer a Recovery.

AND WHEREAS the said J. B. is desirous of enlarging the several estates-tail limited to him as aforesaid, into estates in fee simple, subject to the estate-tail of the said S. D.

FORM XXX.

Expediency of Recovery.

AND WHEREAS it is deemed expedient that a recovery should be suffered by the said B. B. party hereto, for the purpose of barring his estate-tail, if any, in the said &c. hereinafter released, &c. and the reversions and remainders over and expectant upon such estate-tail.

FORM XXXI.

Request to join in suffering a Common Recovery.

AND WHEREAS the said F. G. hath requested the said B. B. party hereto, and J. T. and M. his wife to join with him in suffering a common recovery of the said hereafter released, and in limiting the same *to the use* of the said F. G. his heirs and assigns for ever, discharged of the said estate-tail, and the reversions and remainders over, and also discharged from the dower, right, and title of dower of the said M. T.

FORM XXXII.

Short Recital of the Creation of the Estate-Tail, and Agreement to suffer a Recovery for the purpose of effecting a Partition.

WHEREAS the said F. A. P. and E. M. are the daughters and only children of J. A, late of, &c. and as such are tenants in common, in tail, of the messuages and hereditaments hereinafter described, and also released or otherwise assured or intended so to be, under and by virtue of the last will and testament of R. W, &c. bearing date, &c. and proved in the prerogative court of the archbishop of Canterbury, on, &c. AND WHEREAS the said W. P. and F. A. his wife, and E. M. have agreed to join in suffering a common recovery of the said messuages, &c. and have also agreed upon a partition of the same messuages, &c. and for those purposes have consented and agreed that the same messuages, &c. shall be limited to the uses hereinafter expressed and declared, of and concerning the same.

FORM XXXIII.

Deduction of Title into the intended Vouchee.

AND WHEREAS the said J. C. is the only son and heir at law of the said L. C. deceased, (formerly L. N.) by A. C. her husband deceased: and the said L. C. was one of the three daughters of R. N. deceased: and the said J. C, (being the only surviving issue of the said R. N,) is seised to him and his heirs of the said hereinafter described, and hereby released, or otherwise assured, or intended so to be, for an estate-tail in possession, under or by virtue or means of certain indentures of lease and release, bearing date, &c., and made, &c.; whereby the said were conveyed and assured, or appointed, to M. T. since deceased for her life; with remainder as to one of the said *to the use* of W. N. for an estate-tail which is determined by his death, without issue; with remainder *to the use* of the said R. N. in tail, and as to the other of the said with the appurtenances, *to the use* of the said R. N. in tail.

FORM XXXIV.

Intention to suffer Recovery, and Agreement of Tenant for Life to join in Recovery Deed.

AND WHEREAS the said is desirous to bar the said estate-tail, and all remainders dependant thereon, and hath requested the said to do such acts as shall be necessary for vesting in some person the freehold of the said premises that he may become tenant thereof, and that one or more common recovery or recoveries may be suffered of the same. AND WHEREAS the said hath consented to grant and release the said premises to in manner hereinafter mentioned, yet so, as not to prejudice the use or estate by the said recited settlement limited to her for life, for her jointure; or any of the powers, remedies, and privileges for her benefit therein contained.

N. B. *The limitation was for the joint lives of the jointress and tenant to the præcipe; subject to a condition to defeat the estate in default of payment of* £100,000 *on a given day.*

FORM XXXV.

Deduction of Title into the intended Vouchee, and Determination to suffer Recovery.

AND WHEREAS under and by virtue of the said will of W. H. late of, &c. deceased, bearing date, &c. and by the several deaths of A. the wife of the said testator, and E. B, who were tenants for life under that will, the said E. J. is tenant in tail in possession of the messuage, &c. hereinafter particularly described, and also released, or otherwised assured, or intended so to be, and is desirous, and hath determined to suffer a recovery thereof.

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FORM XXXVI.

Doubts of the Validity of a former Recovery. And Agreement to suffer another Recovery.

AND WHEREAS doubts are entertained of the validity of the said last recited recovery, for want of the concurrence of the person in whom the legal estate was vested at that time, and on that account it is deemed expedient that another recovery should be suffered; and upon the application, and at the instance and request of the said G. V. the said E. R. hath agreed to join in the conveyance hereinafter contained, and to suffer another recovery of the said capital messuage, &c.

FORM XXXVII.

Determination to suffer a Recovery, and consent of Dowress to join.

AND WHEREAS the said J. A. hath determined to suffer a common recovery of the said hereinafter described, and hereby released, &c. and to settle the same *to the uses*, upon the trusts, and for the ends, intents, and purposes, hereinafter expressed and declared, concerning the same; and the said A. A. hath agreed to join in the conveyance hereinafter contained, and the recovery hereby agreed to be suffered, for the purpose of extinguishing all such dower, right, and title of dower, as she hath of and in the same hereditaments.

FORM XXXVIII.

Recital of Two Bargains and Sales, and Two Recoveries.

AND WHEREAS by two several indentures of bargain and sale, of three parts, one bearing date, on or about, &c. and the other bearing date on or about, &c. and each made, or expressed to be made, between, &c. and each duly inrolled in his majesty's court of K. B. at Westminster, and a common recovery suffered in Michaelmas term, in the year of the reign of his present majesty, in pursuance of a covenant or agreement in that behalf, contained in the said indenture of bargain and sale, bearing date on, or about, &c. and a common recovery suffered in Michaelmas term, in the 39th. year of the reign of his present majesty in pursuance of a covenant or agreement in that behalf contained in the indenture of bargain and sale, bearing date on or about, &c. in each of which recoveries the said was demandant; the said tenant; and the said vouchee, who vouched over the common vouchee, all, &c. were conveyed, &c.

FORM XXXIX.

Recital of Recovery Deeds, and Recovery.

AND WHEREAS for better securing the payment of the said principal sum of £ and interest, and by indentures of lease and release, bearing date, &c. and made, &c. and by a common recovery suffered in pursuance of an agreement contained in the same indenture of release, the said manors, &c. were limited and assured, to the use of the said his heirs and assigns, for ever; subject, nevertheless, to such right, power, and equity of redemption by, or in favor of the said his heirs, executors, administrator or assigns, as was then subsisting of, in, or upon the same manors, &c. under or by force, or virtue of the said hereinbefore recited indenture of re ease or mortgage.

FORM XL.

Recital of Recovery suffered.

AND WHEREAS a common recovery was suffered as of Trinity term in the said year of our Lord 1782, and in that recovery the said P. D. was duly vouched, in pursuance of the said recited indenture of bargain and sale.

FORM XLI.

Short Reference to a Recovery suffered; and the Uses thereof.

AND WHEREAS the said R. L. hath in due form of law suffered a common recovery of all the manors, &c. comprised in the said term of 1200 years, and by virtue or means of the said recovery, and the declaration of the uses thereof, is now seised of the fee-simple and inheritance of the same lands and hereditaments.

FORM XLII.

Mode of introducing the Recital of a Lease, Release, Fine, and Recovery, and Declaration of the Uses thereof.

AND WHEREAS by indentures of lease and release, &c. made between, &c. and by a fine levied, and common recovery suffered, in pursuance of several covenants and agreements contained in the said indenture of release, and by a declaration of the uses of the same fine and common recovery respectively contained in the said indenture of release, all, &c. were, &c.

FORM XLIII.

Recital of Recovery suffered after Death of Tenant for Life.

AND WHEREAS after the decease of the said countess, the said J. earl of S. in order to bar all estates-tail and remainders, and to acquire to himself an absolute estate in fee-simple, did by indentures of lease and release, bearing date respectively on or about, &c. the indenture of release being of three parts, and made or express-

ed to be made between, &c. grant, release, and convey, all and singular the same hereditaments and premises unto and to the use of the said and his heirs, to make him tenant of the freehold, in order that a common recovery might be suffered thereof; and the same common recovery was by the said indenture of release, of, &c. declared to enure to the use of the said J. earl of S. his heir and assigns for ever: and a common recovery in which the said J. earl of S. was vouched, was accordingly suffered and perfected as of Michaelmas term, 1797.

FORM XLIV.

Recital of a Recovery suffered with treble Voucher.

AND WHEREAS the said R. W, &c. did as of the same Trinity term suffer a common recovery of the hereditaments comprised in the said fine, and among them of the said messuage or tenement, &c. hereby released, &c.; and in the said recovery H. W, gentleman, was demandant, the said H. B. tenant, the said R. W. was the first vouchee, the said J. N. and M. his wife were second vouchees, and the said J. N. and M. his wife vouched over the common vouchee.

FORM XLV.

Recital of a Recovery suffered of Customary Lands, &c.

AND WHEREAS for the purpose of extinguishing all estates-tail and equitable interests in the nature of an estate-tail, which the said C. J. C. then had in the said parcel of customary land with the appurtenances, and for barring all remainders, and other estates expectant on the estates-tail or equitable interests, the said C. J. C. did on or about the day of now last past, duly surrender the same parcel of customary land to the use of C. D.; and a recovery hath since been duly suffered in the court of the lord of the said manor, of the same parcel of customary land, with the appurtenances; and in that recovery the said A. B. was demandant, the said C. D. tenant, and the said C. J. C. vouchee; and he vouched over, according to the usual customary mode of suffering recoveries, for barring intails of copyhold lands, parcel of the said manor; and the same parcel of customary land hath been surrendered by the said C. D. to the use of the said C. J. C. his heirs and assigns, and he hath been readmitted thereto.

FORM XLVI.

Recital that it is expedient that a Tenant in a former Recovery Deed should join in a New Recovery Deed.

AND WHEREAS it is deemed proper that the said E. E. should join in the release made by these presents, of the hereditaments of the said A. A, to the end that the said E. E. may thereby pass out of him, any estate or interest in the same hereditaments which may have vested in him by force of the general clause following the particular description of the parcels contained in the indenture of lease and release of the and days of now last past, and which are hereinafter cited.

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FORM XLVII.

Recital of Agreement to comprise other Lands in the Recovery, and declare the Uses of these Lands in another Deed.

AND WHEREAS it hath been agreed that other lands and hereditaments of the said B. B. party hereto, situate in the patish of L. in the said county of L. and which are to be conveyed to the said J. A. by other indentures of lease and release, the indenture of lease bearing date, &c. should be comprised in the said recovery, and that D. the wife of the said B. B. party hereto, should join with the said B. B. in the said recovery: and that the uses of the lands in L. should be declared to or in favour of the said J. A, his heirs and assigns, by the said last mentioned indenture of release.

FORM XLVIII.

Recital of Lease, Release, and Common Recovery, and Declaration of the Uses thereof.

AND WHEREAS by indentures of lease and release, bearing date respectively on or about the and days of now last past, the indenture of release being of four parts, and made or expressed to be made between, &c. and by a common recovery duly suffered in Michaelmas term now last past, in which the said was demandant, the said tenant, and the said vouchee, who vouched over, and by a declaration of the uses of that recovery contained in the said last mentioned indenture of release: all the said messuages, &c. are discharged of and from the said estate-tail, and all reversions and remainders over and expectant on the same estate-tail, and now stand limited (subject nevertheless as hereinbefore is mentioned), to the use of the said his heirs and assigns for ever.

FORM XLIX.

Recital of Recovery suffered pursuant to Agreement.

AND WHEREAS a common recovery of the said was suffered in Michaelmas term in the year of the reign of his present majesty king George the third, between the said F. F. demandant, the said J. B. tenant, and the said B. L. vouchee, pursuant to the said covenant or agreement in that behalf contained in the said last in part recited indenture of release, and in that recovery the said B. L. vouched the common vouchee.

FORM L.

Recital that Recovery was voidable for want of the Concurrence of Tenant for Life. Expediency of another Recovery. Consent of necessary Parties to join.

AND WHEREAS it is apprehended that the said hereinbefore recited recovery was voidable as far as the same related to or concerned the said messuages, &c. hereby released or otherwise assured, or intended so to be, for want of the concurrence of the said J. B. in conveying the freehold of the said messuages, &c. to the said H. B.; and it is therefore deemed expedient that another recovery should be suffered. AND WHEREAS the said J. N. and M. his wife are willing to join in the said recovery, and to be vouched for the purpose of barring the estate-tail of the said M. N. in the said messuages, &c. hereby released, &c. AND WHEREAS the said J. S, J. N. and M. his wife, have applied to the said H. B. and J. B. and requested them to join with the said in conveying the said messuages, &c. hereby released, &c. unto and to the use of the said his heirs and assigns, to the intent that he may be tenant of the freehold of the same messuages, &c. and that a recovery may be suffered thereof, to the use of the said J. S. his heirs and assigns for ever; upon the trusts which by the said last hereinbefore recited indentures of lease and release are declared of and concerning the said messuages, &c. hereby released, &c.

FORM LI.

Recital of Bargain and Sale and Common Recovery, and Declaration of the Uses thereof.

AND WHEREAS by indenture quadrupartite, bearing date on or about the day of and made between, &c. and duly inrolled in the court of on or about the day of , and by a common recovery suffered in pursuance of a covenant for that purpose contained in the said indenture of bargain and sale, and a declaration of the uses of that recovery, contained in the same indenture of bargain and sale, the said manors, messuages, lands, and hereditaments were discharged from the estate-tail of, &c. and limited to the use of the said H. G. and F. G. their heirs and assigns for ever.

FORM LII.

Recital of Indentures of Lease and Release, and Common Recovery, and Declaration of Uses.

AND WHEREAS under and by virtue of certain indentures of lease and release, bearing date respectively, on or about the and days of in the year and made or expressed to be made between, &c. and by means of a common recovery duly suffered in pursuance of a covenant or agreement contained in the said indenture of release, and a declaration of the uses of that recovery contained in the same indenture of release, all that manor, and those messuages, &c. hereinafter mentioned, and described to be situate in the county of N, and hereby granted, &c. with their and every of their rights, members, and appurtenances were conveyed or otherwise assured, to the use, &c.

AN

ANALYTICAL DIGEST,

BY WAY OF

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